

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 2 FOR THE COUNTY OF LOS ANGELES
 3 DEPARTMENT 308 HON. CHARLES MC COY, JUDGE
 4 RICHARD BOEKEN,)
)
 5 PLAINTIFF,)
)
 6)
) CASE NO. BC226593
 7 VS.)
)
 8 PHILIP MORRIS,) VOLUME 38
 INCORPORATED, A)
 9 CORPORATION; INTERNATIONAL)
 HOUSE OF PANCAKES)
 10 INCORPORATED, A)
 CORPORATION.)
 11)
 DEFENDANTS.)
 12)

13 REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS
 14 FRIDAY, MAY 18TH, 2001

15 APPEARANCES:

16 (FOR PLAINTIFF) LAW OFFICES OF
 MICHAEL J. PIUZE
 17 11755 WILSHIRE BLVD.
 SUITE 1170
 18 LOS ANGELES, CA 90025
 19 (FOR DEFENDANTS) ARNOLD & PORTER
 BY: MAURICE A. LEITER
 20 JOHN CARLTON
 777 S. FIGUEROA ST.
 21 44TH FLOOR
 LOS ANGELES, CA 90017

22 LISA C. RIDLEY
 23 OFFICIAL REPORTER
 600 S. COMMONWEALTH AVE.
 24 ROOM 308
 LOS ANGELES, CA 90005

25 VOLUME 38 OF
 26 PAGES 5952 THROUGH 6036

27
 28

5952

1 LOS ANGELES, CALIFORNIA; FRIDAY, MAY 18TH, 2001
 2 9:00 A.M.
 3 DEPARTMENT 308 HON. CHARLES MC COY, JUDGE
 4
 5 (THE FOLLOWING PROCEEDINGS
 6 WERE HELD IN OPEN COURT IN
 7 THE PRESENCE OF THE JURY.)
 8
 9 THE COURT: GOOD MORNING, LADIES AND
 10 GENTLEMEN. GOOD TO SEE ALL OF YOU.
 11 GOOD MORNING, GOOD COUNSEL.
 12 ALL RIGHT, OUR JURY PANEL IS WITH
 13 US AND WE ARE READY TO PROCEED.
 14 MR. PIUZE, YOUR JURY.
 15
 16 OPENING ARGUMENT (CONTINUED)

17
18 BY MR. PIUZE:
19 SO THIS IS ONE OF THE TWO LONGEST
20 CLOSING ARGUMENTS I HAVE EVER GIVEN IN ALMOST 30
21 YEARS OF DOING THIS. AND ON THE ONE HAND, I
22 APOLOGIZE FOR THE LENGTH OF TIME IT IS TAKING, AND
23 ON THE OTHER HAND, I MADE MY DECISION THAT IT IS
24 WORTHWHILE.
25 AND AGAIN, THANK YOU FOR LISTENING
26 AND THANK YOU FOR YOUR ATTENTION TODAY, YESTERDAY,
27 ALL THE WAY THROUGH THIS TRIAL.
28 AND THIS IS MY OPPORTUNITY TO NOW

5953

1 THANK THE COURT, THE STAFF. GREAT JUDGE, GREAT
2 STAFF. SO HERE WE ARE.
3 YESTERDAY AT THE END OF THE DAY, I
4 WAS GOING THROUGH THIS TIME LINE. THIS WILL
5 PROBABLY BE THE LAST TIME YOU SEE THE TIME LINE.
6 SO I WOULD JUST LIKE TO START TODAY BY FINISHING IT
7 UP AND I NEED MR. GOLDSTEIN'S HELP ON THAT.
8 YOU HAVE HEARD FROM VARIOUS PEOPLE,
9 MR. BOEKEN, HIS WIFE, ELVIS MENDEZ, DR. BENOWITZ,
10 DR. BECKSON, THE LAST DOCTOR, AND DR. TRABULUS, I
11 THINK, ABOUT SOME OF MR. BOEKEN'S ATTEMPTS TO QUIT
12 SMOKING.
13 AND YESTERDAY WE TALKED ABOUT THIS
14 ATTEMPT HERE, FOR THE LADY, AND WE ALSO TALKED
15 ABOUT THE FACT THAT IN 1974 AND 1976, MR. BOEKEN
16 ATTEMPTED TO QUIT A COUPLE OF TIMES AND IT HAD TO
17 DO WITH BRONCHITIS AND HIS WIND AND HIS WANTING TO
18 RUN.
19 I BELIEVE IN THAT VIDEO-TAPED
20 DEPOSITION, I HAVEN'T GONE BACK AND LOOKED AT IT,
21 BUT I BELIEVE HE PUT SOME PARAMETERS ON HOW LONG
22 THOSE QUIT ATTEMPTS LASTED. I MAY BE WRONG. BUT I
23 THOUGHT THEY WERE A COUPLE DAYS APIECE.
24 I DON'T KNOW IF THAT'S OF ANY
25 SIGNIFICANCE, BUT THIS LAST WITNESS, BECKSON, SAID
26 MR. BOEKEN WAS A LITTLE VAGUE ON IT.
27 I THINK HE WAS ASKED ABOUT THAT BY
28 MR. CARLTON IN DEPOSITION. I MAY BE WRONG.

5954

1 IN 1980, AFTER HE SAW DR. TRABULUS
2 FOR THE FIRST TIME AND HE WAS COMPLAINING AGAIN
3 ABOUT BRONCHITIS, MR. BOEKEN WENT TO A HYPNOTIST
4 WITH HIS SISTER. HE STOPPED SMOKING FOR
5 APPROXIMATELY 35 TO 40 DAYS. AND NOW AFTER MORE
6 THAN A MONTH OF NON-SMOKING, HE FELL BACK INTO THE
7 PATTERN OF SMOKING.
8 I TELL YOU THAT MR. BOEKEN, AS WE
9 ALL KNOW, IS ABLE TO QUIT HEROIN, WHICH HE KNEW WAS
10 BAD FOR HIM, HE WAS ABLE TO GET OFF OF METHADONE,
11 HE WAS ABLE TO QUIT ALCOHOL, BECAUSE HE THOUGHT
12 THAT WAS BAD FOR HIM, AND HE WAS NEVER ABLE TO QUIT
13 CIGARETTES.
14 AND I THINK THE PRIME QUESTION IS,
15 IF HEROIN CAN BE QUIT, WHY CAN'T CIGARETTES BE
16 QUIT?
17 THERE WAS TESTIMONY HERE FROM NEAL
18 BENOWITZ AND AT LEAST ONE OF THESE DOCUMENTS THAT
19 WILL BE ENTERED INTO THE JURY ROOM THAT QUITTING
20 NICOTINE IS AS HARD AS QUITTING HEROIN OR ONE OF
21 THEM SAID MAYBE HARDER.

22 AND CERTAINLY DR. BENOWITZ TOLD YOU
23 THAT HE HAS TREATED ADDICTS UP IN SAN FRANCISCO AT
24 THE GENERAL HOSPITAL WHERE PEOPLE HAVE BEEN ABLE TO
25 GET OFF OF HEROIN, OFF OF COKE, CRACK, STUFF LIKE
26 THAT, BUT NOT OFF CIGARETTES.
27 I THINK THE REASON THAT MR. BOEKEN
28 IS ABLE TO QUIT TWO SUBSTANCES AND NOT THE THIRD

5955

1 SUBSTANCE IS SIMPLE, HE DOES NOT PERCEIVE THE THIRD
2 SUBSTANCE TO BE AS HARMFUL AS THE FIRST TWO.
3 HEROIN, ILLEGAL. HEROIN, CAN KILL
4 YOU, LIKE THAT. HEROIN IS A BAD THING. AND
5 MR. BOEKEN, AS A YOUNG MAN, WHO WANTED TO BE A ROCK
6 AND ROLL DRUMMER, IN A DIFFERENT TIME AND A
7 DIFFERENT PLACE IN OUR SOCIETY, EXPERIMENTED FOR
8 THREE MONTHS. HE CHICKENED OUT IN A BIG HURRY.
9 FOR THREE MONTHS HE SAID THIS IS NOT FOR ME. I AM
10 AFRAID OF THIS, I WANT OUT OF THIS.
11 HE STOPPED IT. HE WENT ON A
12 METHADONE PROGRAM.
13 AND AFTER APPROXIMATELY THREE YEARS
14 FROM '71 TO '74, HE GOT HIMSELF OFF OF THE
15 METHADONE PROGRAM AND WAS CLEAN.
16 AND IN 1976 HE WENT TO A.A., GOT
17 HIMSELF OFF OF ALCOHOL AND WAS SOBER.
18 AND SINCE 1976, HE'S BEEN CLEAN AND
19 SOBER.
20 HE PERCEIVED THOSE TWO THINGS TO BE
21 A BIG RISK FOR HIM.
22 HE DID NOT PERCEIVE CIGARETTE
23 SMOKING TO BE AS BIG A RISK FOR HIM.
24 AND THE ISSUE IN THIS CASE, OF
25 COURSE, AND THE ISSUE IN THIS CASE IS, WHY?
26 WELL, THERE WEREN'T ANY PEOPLE OUT
27 THERE FROM THE HEROIN MANUFACTURERS' ASSOCIATION
28 SAYING, HEY, THIS STUFF ISN'T SO BAD FOR YOU, THIS

5956

1 STUFF REALLY WON'T HURT YOU. HEY, WE ARE GOING TO
2 CREATE A LITTLE DOUBT ABOUT THIS IN YOUR MIND SO
3 YOU ARE GOING TO KEEP USING IT.
4 AND SIMILAR, THERE WAS NO ONE FROM
5 SEAGRAMS AND THERE WAS NO ONE FROM MILLER, WHICH
6 PHILIP MORRIS OWNS, GIVING MESSAGES LIKE THAT.
7 THERE WAS ONLY ONE GROUP THAT WAS
8 GIVING HIM MESSAGES TO KEEP HIM IN. AND THERE WAS
9 ONLY ONE GROUP THAT WAS GIVING HIM MESSAGES TO KEEP
10 HIM INTERESTED.
11 THIS STUFF ISN'T AS BAD AS THEY
12 SAY.
13 WE ARE NOT REALLY SURE IT CAUSES
14 CANCER. THERE ARE PLENTY OF OTHER CAUSES OF CANCER
15 AND AS RECENTLY AS WITHIN THE LAST TWO WEEKS, YOU
16 ALL HEARD A BIOLOGIST UP HERE WHO HAS HAD HER
17 RESEARCH FUNDED BY THE TOBACCO INDUSTRY SAYING WE
18 DON'T KNOW WHAT THE CAUSES ARE. 80 PERCENT OF
19 PEOPLE DON'T GET IT.
20 WHY DON'T ALL THESE SMOKERS NOT GET
21 IT, WHY DO SOME PEOPLE WHO DON'T SMOKE GET IT?
22 THE SAME OLD THING THAT WE HEARD
23 AGAIN AND AGAIN AND AGAIN AND AGAIN.
24 ANYWAY, MR. BOEKEN, IN 1980, WENT
25 TO SEE DR. TRABULUS, FIRST TIME. THERE'S A BIG
26 NOTE IN DR. TRABULUS'S NOTES BECAUSE IT'S A FIRST

27 VISIT. HE LAYS OUT HIS HISTORY. HERE'S WHAT I DID
28 FOR A LIVING. I WAS A CONSTRUCTION WORKER. I DID

5957

1 THESE THINGS. HERE'S MY HISTORY.
2 I USED TO DRINK, I DON'T DRINK ANY
3 MORE. I USED TO DO THIS DRUG. I DON'T DO THIS
4 DRUG ANY MORE. I DO SMOKE.
5 AND AFTER THAT, HE QUIT. AND HE
6 FAILED.
7 AND TWO YEARS LATER HE TRIED TO
8 QUIT AGAIN AND FAILED.
9 ONE, TWO, THREE, FOUR, FIVE, SO
10 FAR.
11 IN 1984, THE TOBACCO INDUSTRY GOES
12 TO CONGRESS AND GIVES THEM A DOCUMENT WHICH I HAVE
13 ALREADY SHOWED YESTERDAY WHICH YOU ARE GOING TO
14 HAVE IN THE JURY ROOM, AND THE TOBACCO INDUSTRY
15 TELLS THE UNITED STATES CONGRESS, AND THE WORLD, WE
16 DON'T KNOW THAT SMOKING CAUSES LUNG DISEASE, WE
17 DON'T KNOW THAT AT ALL.
18 IT'S ALL UP IN THE AIR, NOTHING IS
19 PROVEN, WE DON'T KNOW ANYTHING.
20 IT WAS A LIE. IT WASN'T WRONG, IT
21 WASN'T A MISSTATEMENT, THEY DIDN'T JUST HAPPEN TO
22 BE OFF ON THAT. IT WAS A FLAT OUT LIE. AND THAT'S
23 WHY I SPENT ALL THAT TIME WITH ALL THOSE DOCUMENTS
24 YESTERDAY TO SHOW YOU WHAT THEY KNEW WHAT THEY
25 KNEW, WHAT THEY WERE SAYING BEHIND CLOSED DOORS AND
26 WHY THEY WERE GOING TO DO IT. THEY LIED.
27 NOW, MR. BOEKEN JOINED SMOKERS
28 ANONYMOUS TWICE IN HERE IN THE LATE 1980'S.

5958

1 AND ON THOSE TWO OCCASIONS, I DON'T
2 BELIEVE ON THOSE TWO OCCASIONS THAT HE EVER
3 ACTUALLY PUT THE CIGARETTES DOWN.
4 HE WENT TO THE MEETINGS, AND HE
5 LISTENED AND I THINK HE WENT WITH HIS WIFE AT LEAST
6 ONE SET OF MEETINGS, BUT HE NEVER PUT THE
7 CIGARETTES DOWN.
8 HE WAS GETTING READY, HE WAS
9 GETTING READY, HE WAS GETTING READY AND HE DIDN'T.
10 IN HERE, WE START RED, AND WE GO
11 GOLD, AND WE GO A DIFFERENT KIND OF GOLD, AND
12 FINALLY WAY UP HERE AT THE END, THIS IS ULTRA
13 LIGHTS, WE GO PLATINUM.
14 AND HE SMOKED DOWN, JUST LIKE THE
15 MILLIONS AND MILLIONS AND TENS OF MILLIONS OF OTHER
16 PEOPLE IN THIS COUNTRY, BECAUSE HE THOUGHT THESE
17 THINGS WEREN'T AS BAD. LOW TAR, WHATEVER TAR IS,
18 CAN'T BE GOOD, LOW TAR, EVERYONE ADVERTISES IT, I
19 AM GOING TO GO WITH IT.
20 SO HE GOES DOWN, DOWN, DOWN.
21 I AM GOING TO TALK ABOUT LOW TAR AS
22 SOON AS WE PUT THIS BOARD DOWN.
23 IN 1994, THAT'S WHEN CAMPBELL GOT
24 UP AND WE HAVE SEEN HIM AT LEAST FOUR TIMES DURING
25 THIS TRIAL. HE'S THE GUY WHO WINDS UP WITH THAT
26 LITTLE SMIRK ON HIS FACE, WHAT ARE YOU GOING TO DO
27 ABOUT IT?
28 WHAT ARE YOU GOING TO DO ABOUT IT

5959

1 CONGRESS MAN WAXMAN? WHAT ARE YOU GOING TO DO
2 ABOUT IT?

3 THERE'S SOMETHING ON HERE,
4 SOMETHING NOT ON HERE. I WILL JUST REMIND YOU THAT
5 ACCORDING TO DR. SAM HAMMAR, IN 1989 IS WHEN
6 MR. BOEKEN HAD CANCER, AND THE DYE WAS CAST AT THAT
7 POINT.

8 NO ONE COULD KNOW IT. IT'S NO
9 ONE'S FAULT THAT NO ONE KNEW IT. IT'S NO DOCTOR'S
10 FAULT THAT NO ONE KNEW IT. IT IS JUST THE WAY IT
11 IS.

12 THE CELLS START DIVIDING, THE CELLS
13 GET SCREWED UP. IT TAKES A LONG, LONG, LONG TIME.
14 AND ON DOUBLING TIME IT TOOK TEN YEARS BEFORE IT
15 ACTUALLY SHOWED UP ON AN X-RAY.

16 AND THIS WAS CAUGHT EARLY. MR.
17 BOEKEN'S WAS CAUGHT EARLY.

18 BUT THE DYE WAS CAST BACK HERE IN
19 1989.

20 SO THIS PLAYS OUT WITH THIS GUY AND
21 THE SEVEN C.E.O.'S IN FRONT OF CONGRESS.

22 AND THEN WE GET TO 1999 HERE. IT'S
23 SORT OF IRONIC, AND TWO THINGS HAPPEN IN OCTOBER OF
24 1999, PHILIP MORRIS PUTS ON ITS NEW PUBLIC FACE.
25 ONE OF THE "L.A. TIMES" ARTICLES THAT I THINK YOU
26 ARE GOING TO SEE, AND THAT I DISCUSSED EXTENSIVELY
27 WITH ELLEN MERLO, THAT'S WHEN PHILIP MORRIS CAME
28 OUT AND MADE IT'S PUBLIC RELATIONS ANNOUNCEMENT,

5960

1 WHERE WE ARE NO LONGER GOING TO DENY THAT SMOKING
2 CAUSES DISEASE, THEY DIDN'T ADMIT IT YET, THAT TOOK
3 ONE MORE YEAR.

4 BUT WE ARE NO LONGER GOING TO DENY
5 IT.

6 AND THAT'S WHEN THEY PUT ON THEIR
7 SUPPOSED NEW FACE, THAT'S WHEN THEY HAD A CORPORATE
8 NEW POSITION.

9 THERE WAS NO NEW SCIENCE. THERE
10 WAS NO MEDICAL BREAK THROUGH. NO ONE CAME FORWARD
11 WITH THEM AND GAVE THEM ANYTHING THEY DIDN'T
12 ALREADY KNOW. THEY JUST TOOK THE INFORMATION THAT
13 THEY ALWAYS HAD AND SAID, GEE, OKAY, BUT I WANT YOU
14 TO REMEMBER, THE END OF 1997, THAT'S WHEN THEY WERE
15 PUT IN THE CORNER. AND THAT'S THE SETTLEMENT THAT
16 MR. CARLTON -- DID THEY HAVE A CORPORATE CHANGE OF
17 POSITION JUST BECAUSE THEY WERE GOOD GUYS, OR DID
18 THEY HAVE A CORPORATE CHANGE OF POSITION BECAUSE
19 THEY HAD NO PLACE TO GO OR DID THEY HAVE A
20 CORPORATE CHANGE OF POSITION FOR US?

21 BECAUSE YOU SEE, MS. MERLO SAID, WE
22 TEST MARKET EVERYTHING, EVERYTHING. WE RUN FOCUS
23 GROUPS ON EVERYTHING. WE DO PUBLIC OPINION POLLS
24 ON EVERYTHING. WE WANT TO KNOW WHAT THE PUBLIC
25 THINKS ABOUT US. WE GO OUT AND ASK THE PEOPLE,
26 WHAT DO YOU THINK ABOUT THIS, WHAT DO YOU THINK
27 ABOUT THAT, WHAT DO YOU THINK ABOUT THIS, WHAT DO
28 YOU THINK ABOUT THAT.

5961

1 AND SO THE CHANGE IN CORPORATE
2 POSITION AT THE END OF 1999 WAS JUST THAT, IT
3 WASN'T SCIENCE, IT WASN'T MEDICINE, THEY DECIDED
4 FOR SOME REASON, EITHER HAVING TO DO WITH
5 LITIGATION THEY HAD BEEN IN OR PUBLIC OPINION THAT
6 THEY ARE GOING TO PUT ON A NEW FACE, NEW POSITION.

7 WELL, PUTTING ON A NEW FACE IS

8 PUTTING ON A MASK.
9 SO HERE WE HAVE THE NEW PHILIP
10 MORRIS STARTING IN OCTOBER OF 1999.
11 AND IRONICALLY ONE OTHER THING
12 HAPPENED IN 1999 IN OCTOBER, RICHARD BROKEN GOT
13 DIAGNOSED WITH LUNG CANCER.
14 SO THE NEW FACE, THE NEW POSITION,
15 ALL THAT NEW STUFF WAS TOO LATE FOR HIM BY TEN
16 YEARS. AND IF 400,000 PEOPLE A YEAR, IT WAS TOO
17 LATE FOR THAT 400,000 PEOPLE BY TEN YEARS.
18 FINALLY, HERE, IN THE YEAR 2001 --
19 THE PRESIDENT HERE IS HARRY TRUMAN. THE WAR IN
20 KOREA HASN'T STARTED. NO ONE HAS TELEVISION IN
21 THIS COUNTRY. FORGET CELL PHONES AND FAXES, NO ONE
22 HAS TELEVISION IN THIS COUNTRY.
23 THE DODGERS ARE IN BROOKLYN, THE
24 LAKERS ARE IN MINNEAPOLIS.
25 THE RAMMS, CLEVELAND.
26 50 YEARS. IT TOOK THEM 50 YEARS
27 FOR A CONSUMER PRODUCT COMPANY THAT SELLS STUFF TO
28 PEOPLE TO BE PUT INTO THEIR BODIES AND IT TOOK THEM
5962
1 50 YEARS TO COME FORTH AND ADMIT WHAT HAD BEEN, BY
2 THEIR OWN RECKONING, BY THEIR OWN EXPERT'S
3 RECKONING, A CONSENSUS OF SCIENCE AND MEDICINE
4 SINCE 1964 IN JANUARY. SO THAT'S 35 OR SIX YEARS'
5 WORTH OF LOST TIME.
6 BUT AS I TRIED TO POINT OUT
7 YESTERDAY, AND I WILL SAY ONE MORE TIME, IF THERE'S
8 A QUESTION ABOUT A CONSUMER PRODUCT, BE IT A
9 FIRESTONE TIRE, BE IT BAD CHEESE, ALL CONSUMER
10 PRODUCT COMPANIES, THEY DON'T WAIT -- THEY TAKE IT
11 OFF THE MARKET -- UNTIL IT'S TESTED AND YOU KNOW
12 IT'S GOOD, THEY DON'T WAIT UNTIL IT IS PROVEN BAD.
13 WHAT DR. FARONE SAID, AMONG OTHER
14 THINGS, OVER AT LEVER BROTHERS WHERE HE WAS THE
15 YEAR OR SO BEFORE HE WENT TO PHILIP MORRIS, THAT'S
16 A CONSUMER PRODUCT COMPANY, HE WAS EITHER THE CHIEF
17 CHEMIST OR ONE OF THE CHIEF CHEMISTS THERE, HE WAS
18 IN CHARGE OF SAFETY THERE, THEY TESTED EVERYTHING
19 ON ANIMALS. SHAMPOO, TOOTHPASTE, ANYTHING THAT
20 PEOPLE ARE GOING TO BREATHE, ANYTHING THAT WAS
21 GOING TO GO IN PEOPLE'S MOUTHS, ANYTHING GOING TO
22 TOUCH PEOPLE'S SKIN, THEY TESTED THAT FIRST ON
23 ANIMALS.
24 THE TOBACCO INDUSTRY HERE DID NOT
25 TEST ITS PRODUCTS. IT DIDN'T TEST IT'S PRODUCT ON
26 ANIMALS.
27 THE GENTLEMEN'S AGREEMENT WHICH I
28 AM GOING TO JUST TOUCH ON A LITTLE BIT WHEN I PUT
5963
1 THIS CHART DOWN HERE, THE GENTLEMEN'S AGREEMENT
2 CALLED FOR ANY KIND OF BIOLOGICAL TESTING TO BE
3 DONE OVERSEAS WHERE IT WAS OUT OF REACH OF THE U.S.
4 GOVERNMENT.
5 THE GENTLEMEN'S AGREEMENT CALLED
6 FOR THE TOBACCO INDUSTRY AND PHILIP MORRIS, AS PART
7 OF THE TOBACCO INDUSTRY, NOT TO CONDUCT ANY KIND OF
8 TESTING HERE ON OUR SHORES.
9 SOME OF THESE COMPANIES CHEAT A
10 LITTLE BIT AMONG THEMSELVES. SO, FOR INSTANCE, WE
11 KNOW THAT PHILIP MORRIS WAS DOING NICOTINE
12 ADDICTION TESTS WITH RATS. THEY WERE BREAKING THE

13 GENTLEMEN'S AGREEMENT. BUT IT WAS DONE IN SECRECY
14 THERE. THE RATS' CAGES WERE BROUGHT IN IN THE
15 DARKNESS AND COVERED UP AND IT WAS A BIG SECRET.

16 BUT THAT STILL ISN'T CANCER TESTS.
17 THAT ISN'T BIOLOGICAL ACTIVITY.

18 AND WE KNOW FROM THE DOCUMENTS, WE
19 TALKED ABOUT YESTERDAY, NOT ONLY DID THEY NOT TEST
20 FOR CANCER, THEY PURPOSELY HAD A COMPANY POLICY TO
21 AVOID TESTING FOR CANCER.

22 SO HERE'S A 50-YEAR SPAN, WHY DO,
23 WHY ARE COMPANIES SUPPOSED TO USE, IT'S NOT A
24 GOVERNMENT REGULATION, BUT IT'S COMMON SENSE, WHY
25 DO COMPANIES USE ANIMALS TO TEST RATHER THAN
26 PEOPLE?

27 BECAUSE THE COMPANIES DON'T WANT TO
28 HURT PEOPLE WITH THEIR PRODUCT.

5964

1 WHAT HAPPENED HERE IS THAT THIS
2 TURNED OUT TO BE THE LARGEST ANIMAL EXPERIMENT EVER
3 DONE, BUT IN THIS TEST, RABBITS WEREN'T USED, MICE
4 WEREN'T USED, RATS WEREN'T USED, PEOPLE WERE USED.

5 AND FOR US EX-SMOKERS, PEOPLE WERE
6 USED.

7 IT IS THE -- IT'S BREATHTAKING TO
8 ME THAT IN THE YEAR 2001, WHEN PHILIP MORRIS NOW
9 HAS DECIDED THAT THEY ARE GOING TO ADMIT THAT THEIR
10 TOBACCO CAUSES CANCER, LOOK AT THE POSSIBILITIES
11 THAT OPENS UP.

12 IF WE ADMIT THAT, WE CAN NOW TEST
13 OUR PRODUCTS.

14 IF THEY ADMITTED THAT BACK IN 1964,
15 THEY COULD HAVE STARTED TESTING THEIR PRODUCTS IN
16 1964.

17 IF THEY, IN 1955, LOOKED AT THIS
18 CONTROVERSY AND SAID, GEE WHIZ, OUR STUFF IS REALLY
19 HURTING PEOPLE, THERE ARE REPUTABLE SCIENTISTS OUT
20 THERE THAT SAY OUR STUFF IS HURTING PEOPLE, RATHER
21 THAN HIRE A PUBLIC RELATIONS FIRM, LET'S TEST THIS
22 STUFF.

23 DR. CARCHMAN -- YOU HAD THREE
24 SPOKESMEN HERE FROM PHILIP MORRIS, DR. CARCHMAN SAT
25 UP RIGHT THERE AND SAID, TO THE BEST OF MY
26 KNOWLEDGE, WE HAVE NEVER, EVER ONCE TESTED ANY
27 MARLBORO CIGARETTE FOR BIOLOGIC ACTIVITY, MEANING
28 CANCER, UNTIL WITHIN THE END OF 2000 OR 2001. IT'S

5965

1 OUT OF THEIR MINDS.

2 IT'S AN UNBELIEVABLE THING.

3 AND IT TAKES MY BREATH AWAY WHEN HE
4 SAYS, YEAH, NOW THAT WE ARE TESTING THIS STUFF, WE
5 HAVE GOT TO GET PEOPLE TO SIGN OFF IN ADVANCE.

6 WELL, SON OF A GUN, WHAT ABOUT THE
7 60 MILLION AMERICAN MEN THAT WERE SMOKING THIS
8 STUFF AT THE TIME, 60 MILLION AMERICAN MEN THAT
9 WERE SMOKING THIS STUFF, THEY DIDN'T GET ANYONE TO
10 SIGN OFF IN ADVANCE.

11 50 YEARS, SO SOMEONE SAID HERE, I
12 DON'T CARE WHAT ANYONE SAID HERE, I AM PRETTY GOOD
13 AT MATH, TAKE ANY ONE OF THOSE YEARS, JUST IN ROUND
14 NUMBERS, 400,000 PEOPLE, YOU TAKE ANY ONE OF THOSE
15 DECADES, 4 MILLION PEOPLE, YOU TAKE ANY 25 YEAR
16 BLOCK OF TIME, TEN MILLION PEOPLE. IT BOGGLES THE
17 MIND, BOGGLES THE MIND. THEY DIDN'T TEST THEIR

18 PRODUCT, THEY AVOIDED TESTING THEIR PRODUCTS.
19 THEY GAVE UP ALL OF THIS TIME IN
20 WHICH THEY COULD HAVE, ACCORDING TO DR. FARONE,
21 MADE A SAFE CIGARETTE. BECAUSE HE SAYS, YOU CAN
22 MAKE A SAFE CIGARETTE.
23 BUT THEY LOST ALL OF THIS TIME
24 TRYING, BECAUSE THEY DIDN'T ACKNOWLEDGE THERE WAS A
25 PROBLEM.
26 AND IF YOU DON'T ACKNOWLEDGE
27 THERE'S A PROBLEM, YOU CAN'T FIX IT.
28 SIX-YEAR-OLD RICHARD BOEKEN.

5966

1 TEN-YEAR-OLD RICHARD BOEKEN. FRANK STATEMENT COMES
2 OUT. YOUR HEALTH IS THE MOST IMPORTANT THING TO
3 US.
4 13-YEAR-OLD RICHARD BOEKEN GETS
5 HOOKED ON NICOTINE.
6 AND THE RIDE IS ON.
7 AND HE'S JUST ONE OF 10 MILLION, 15
8 MILLION, 20 MILLION, HOWEVER MILLION.
9 ANYWAY, THIS CHART IS GOING TO BE
10 PUT AWAY NOW. I JUST SAY THAT THIS, IN ROUND
11 NUMBERS, THAT'S RESPONSIBLE FOR MILLIONS AND
12 MILLIONS AND MILLIONS AND MILLIONS AND MILLIONS OF
13 LOST LIVES IN THIS COUNTRY, SLOW, AGONIZING, CRUMMY
14 DEATHS THAT COST A LOT OF MONEY. BECAUSE INSTEAD
15 OF TRYING TO FIX THE PROBLEM, THE PUBLIC RELATION
16 FIRM IS HIRED, AND A STRATEGY CAME THAT WE ARE
17 GOING TO CREATE DOUBT ABOUT THE HEALTH CHARGE
18 WITHOUT ACTUALLY DENYING ANYTHING.
19 OKAY.
20 1975, MARLBORO, 85 IS THIS.
21 "MARLBORO 85 SMOKERS DID NOT
22 ACHIEVE ANY REDUCTION IN SMOKE INTAKE
23 BY SMOKING MARLBORO LIGHTS."
24 HOW ABOUT THAT?
25 THIS IS 1975, 26 YEARS AGO. PHILIP
26 MORRIS KNEW THAT PEOPLE THAT WERE GOING TO SMOKE
27 THEIR LOWER TAR CIGARETTE WERE GETTING EXACTLY AS
28 MUCH TAR AS PEOPLE THAT WERE SMOKING THIS

5967

1 CIGARETTE. THIS, THIS, SAME.
2 TAR IS BAD; RIGHT? EVERYONE KNOWS
3 THAT TAR IS BAD. TAR IS THE POTENTIAL BAD THING.
4 GEE WHIZ, IF TOBACCO DOES CAUSE A PROBLEM, TAR IS
5 THE BAD THING, SO YOU KNOW WHAT WE ARE GOING TO DO,
6 WE ARE GOING TO REDUCE THE TAR.
7 WELL, THEY KNEW SOMETHING THAT THE
8 AMERICAN PUBLIC DIDN'T KNOW. AND WHAT THEY KNEW IS
9 THAT BY REDUCING TAR, YOU DON'T REDUCE -- EXCUSE
10 ME -- THEY KNEW THAT BY GIVING YOU A LIGHT
11 CIGARETTE, YOU DON'T REDUCE ANYTHING.
12 WHO TOLD YOU THAT? DR. FARONE.
13 DR. BENOWITZ, DR. DOLL,
14 DR. STRAUSS, DR. CARCHMAN, I BELIEVE, TESTIFIED TO
15 THAT.
16 AND WHAT HAPPENS AS A RESULT OF
17 THIS? WHY DOES THAT HAPPEN? IT HAPPENS BECAUSE OF
18 SOMETHING CALLED COMPENSATION. BREATHING IN MORE
19 DEEPLY, TAKING MORE PUFFS, INADVERTENTLY COVERING
20 UP THE HOLES.
21 WHAT'S HAPPENED AS A RESULT OF
22 THAT?

23 A BRAND KNEW KIND OF CANCER OF THE
24 LUNG WHICH WAS ALMOST, WHICH WAS VERY SMALL
25 POTATOES 30 YEARS AGO, ADENOCARCINOMA, THAT'S WHAT
26 RICHARD BROKEN HAS.
27 WENT FROM BEING A SMALL LITTLE
28 PERCENTAGE OF THE LUNG CANCERS TO BEING A HUGE

5968

1 PERCENTAGE.
2 ADENOCARCINOMA FLOATS OUT IN THE
3 LUNG, AS YOU INHALE THE STUFF MORE DEEPLY TO GET
4 YOUR NICOTINE, IT GOES FURTHER INTO THE LUNG.
5 AND YOU HAD THE STRING OF REALLY,
6 TRULY, EXCELLENT, WORD CLASS DOCTORS IN HERE TO
7 EXPLAIN THAT THE CURRENT MEDICAL THINKING IS,
8 PEOPLE SMOKING THOSE LIGHT CIGARETTES INHALE WAY
9 MORE DEEPLY IN ORDER TO GET THE SAME AMOUNT OF
10 PLEASURE, THE SAME AMOUNT OF NICOTINE, AND WIND UP
11 GETTING JUST AS MUCH OF THE BAD STUFF AND THEY GET
12 IT IN A DIFFERENT PLACE, FURTHER OUT IN THE LUNG.
13 LUNG CANCER USED TO BE MORE CENTRAL
14 BEFORE LIGHT CIGARETTES CAME ALONG.
15 NOW, ONE OF THE WITNESSES IN HERE
16 WAS -- A QUESTION TO DR. FARONE, I BELIEVE, IT
17 STARTED THIS WAY, BY MR. LEITER WAS, WELL, THAT'S
18 NO SECRET, GOVERNMENT HAS KNOWN THAT FOR 20, 30
19 YEARS.
20 THAT'S TRUE, GOVERNMENT HAS. THAT
21 IS.
22 THAT'S NO SECRETE, INDUSTRY HAS
23 KNOWN THAT FOR 20, 30 YEARS.
24 FOR SURE.
25 IT'S ONLY A SECRET FROM THE PEOPLE
26 WHO USED IT.
27 AND THE PEOPLE WHO SMOKED DOWN OVER
28 THE COURSE OF TIME, BECAUSE THESE THINGS WERE

5969

1 PERCEIVED TO BE Milder, BECAUSE THEY WERE PERCEIVED
2 TO BE LESS HARMFUL, OR BECAUSE THEY WERE PERCEIVED
3 TO BE WHATEVER, THEY ARE ALL WRONG.
4 THE GOVERNMENT KNEW, PHILIP MORRIS
5 NEW, TOBACCO INDUSTRY KNEW, THE ONLY THING, THE
6 ONLY PEOPLE THAT DIDN'T KNOW WERE THE PEOPLE THAT
7 WERE USING THESE CIGARETTES.
8 AND THIS INFORMATION HAS BEEN OUT
9 THERE FOR AT LEAST 25 YEARS NOW. I THINK THERE ARE
10 EARLIER DOCUMENTS THAT SHOW THIS.
11 WELL, WHAT ABOUT THIS?
12 ONE OF THE CAUSES OF ACTION HERE
13 HAS TO DO WITH A FAILURE TO INSTRUCT, A FAILURE TO
14 INSTRUCT ON HOW TO USE A PRODUCT.
15 IF THESE THINGS REALLY WERE FOR
16 LOWER TAR, SHOULDN'T THE CONSUMERS HAVE BEEN TOLD
17 WHEN THESE THINGS CAME OUT, WHEN THEY CAME OUT IN
18 THE '60'S, SHOULDN'T THE CONSUMERS HAVE BEEN TOLD,
19 HEY, IF YOU ARE GOING TO USE THESE THINGS, WATCH
20 WHERE YOU PUT YOUR HANDS. IF YOU ARE GOING TO USE
21 THESE THINGS, DON'T PUFF SO DEEPLY.
22 IF YOU ARE GOING TO USE THESE
23 THINGS, DON'T PUFF MORE OFTEN.
24 IF THESE THINGS ARE GOING TO BE OF
25 ANY VALUE, I MEAN, IF YOU ARE GOING TO BOTHER USING
26 THESE, INSTEAD OF THESE, YOU HAVE TO SMOKE THEM IN
27 A DIFFERENT WAY.

28 EVERYONE NEW, EXCEPT THE CONSUMER.

5970

1 AND SO ONE OF THE CLAIMS IN THIS
2 CASE IS THAT PHILIP MORRIS, WHEN THEY MARKETED
3 THESE CIGARETTES, SHOULD HAVE TOLD THE CONSUMER
4 WHAT PHILIP MORRIS KNEW AND WHAT THE GOVERNMENT
5 KNEW.

6 AND THEY SHOULD HAVE DONE IT WHEN
7 THESE THINGS FIRST CAME OUT IN THE '60'S. AND IT
8 DOESN'T MATTER, IN THIS CASE, THAT MR. BOEKEN
9 DIDN'T START USING THESE THINGS UNTIL THE '70'S,
10 BECAUSE IF THAT INFORMATION HAD BEEN PUT OUT, AND
11 IF THAT INFORMATION HAD BEEN PUT OUT COMMONLY, AT
12 LEAST EVERYONE WOULD HAVE KNOWN WHAT THEY WERE
13 DOING WHEN THEY BOUGHT THESE THINGS. THAT WAS
14 NEVER, EVER, EVER DONE.

15 THE SECOND CLAIM IN THIS CASE IS
16 WHAT'S CALLED A FAILURE TO WARN.

17 THE FAILURE TO WARN ONLY APPLIES
18 BEFORE 1969 ON JULY 1ST.

19 I SAY, I AM GOING TO QUOTE
20 MR. BOEKEN, IF SOMEONE -- I ASKED HIM A QUESTION IN
21 HIS DEPOSITION, AND IN THE DEPOSITION -- I KNEW THE
22 DEPOSITION WOULD PROBABLY BE PLAYED AT THIS TRIAL.
23 SO IF YOU EVER GET TO REWATCHING THAT, AND I AM NOT
24 SUGGESTING YOU DO, IF YOU EVER GET TO REWATCHING
25 IT, THE PART THIS COMES IN IS WHERE I AM ASKING THE
26 QUESTIONS AT THE BEGINNING.

27 THE QUESTION IS, IF SOMEONE HAD
28 TOLD YOU, REALLY, THE MANUFACTURER HAD COME UP TO

5971

1 YOU AND SAID, FORGET THIS CREATING DOUBT STUFF,
2 FORGET THIS, IT HASN'T REALLY BEEN -- FORGET THIS,
3 IT REALLY HASN'T BEEN PROVEN WRONG. IT REALLY
4 HASN'T BEEN PROVEN THAT THIS CAUSES DISEASE. IT
5 REALLY HASN'T BEEN PROVEN THAT THIS CAUSES CANCER.
6 THERE IS SUBSTANTIAL DOUBT.

7 WE HAVE GOT GREAT SCIENTISTS WHO
8 SAY THIS IS WRONG. WE HAVE GOT GREAT DOCTORS WHO
9 SAY THIS IS WRONG.

10 THERE ARE MANY CAUSES OF CANCER.
11 IT COULD BE THE TAR, IT COULD BE
12 THE SMOG, IT COULD BE YOUR GENES, IT COULD BE
13 YOU'RE GENETICALLY DISPOSED, IT COULD BE STRESS,
14 AND ALL THOSE THINGS WE HEARD ABOUT.

15 IF, INSTEAD OF SAYING THAT TO
16 MR. BOEKEN, WHAT IF THE MANUFACTURER OF MARLBORO
17 HAD SAID, LISTEN, NO B.S., THIS WILL KILL YOU. NO
18 JOKING. THIS WILL KILL YOU. WOULD YOU HAVE QUIT?
19 THIS WILL KILL YOU.

20 HIS ANSWER WAS YES, BUT I HAVE GOT
21 A BETTER QUESTION.

22 WHAT IF THEY HAD SAID THAT IN 1956,
23 BEFORE YOU STARTED SMOKING, WHAT IF THEY HAD TOLD
24 AMERICA, IN 1955 OR 1954 WHEN THIS RESEARCH WAS ALL
25 OVER THE PLACE, THIS STUFF WILL KILL YOU, WELL,
26 THEY WOULDN'T BE IN BUSINESS TODAY.

27 WE WOULDN'T BE HERE TODAY AND
28 MR. BOEKEN WOULD BE GOING ON ABOUT HIS BUSINESS

5972

1 TODAY ALONG WITH ABOUT 15 MILLION OTHER PEOPLE IN
2 THIS COUNTRY.

3 SO THERE IS A FAILURE TO WARN IN

4 1954, '5, '6, '7, '8, '9, '60.
5 DON'T FORGET, EVER SINGLE DAY,
6 ALONG THE LINE, A COUPLE THOUSAND KIDS, 13-YEAR-OLD
7 KIDS, 14-YEAR-OLD KIDS, KIDS THAT DON'T KNOW ANY
8 BETTER, KIDS THAT WANT TO BE COOL, KIDS THAT WANT
9 TO BE LIKE THEIR PARENTS, EVERY SINGLE DAY, ALONG
10 THE LINE, FROM '55, 2,000, 3,000 GET HOOKED ON
11 CIGARETTES.

12 ON MONDAY, JANUARY 1ST, 2 OR 3,000,
13 TUESDAY; JANUARY 2ND, ANOTHER 2 OR 3,000. AND
14 FEBRUARY, WE WILL GO TO 1953, '4, '5, '6.

15 1963, MAYBE 20,000 KIDS GET HOOKED
16 IN A WEEK.

17 NO WARNINGS. NO WARNINGS. NO
18 WARNINGS. NO WARNINGS, NOTHING.

19 AND 1964, WHEN THE SURGEON GENERAL
20 MADE HIS REPORT, THERE WERE STILL NO WARNINGS OF
21 ANY KIND FOR TWO YEARS. AND WHEN THAT WARNING WENT
22 UP, AND YOU KNOW, I GUESS THE SURGEON GENERAL JUST
23 DOESN'T GET TO WRITE EXACTLY WHAT HE WANTS ON THE
24 WARNINGS. I'D LIKE YOU TO REMEMBER THAT THE
25 COMMITTEE THAT WAS CHOSEN TO DO THE SURGEON
26 GENERAL'S REPORT, THEY WEREN'T JUST BIG TIME
27 SCIENTISTS OUT THERE. COULDN'T DO THAT. HAD TO
28 FIND PEOPLE THAT HADN'T EXPRESSED AN OPINION YET.

5973

1 SEE, THE TOP SCIENTISTS THAT HAD
2 BEEN WORKING IN THIS FIELD AND THAT HAD ALREADY
3 COME TO THE CONCLUSION THAT TOBACCO CAUSED LUNG
4 CANCER, THEY WERE KEPT OFF THE SURGEON GENERAL'S
5 PANEL.

6 THE ONLY PEOPLE ALLOWED ON THE
7 SURGEON GENERAL'S PANEL, BECAUSE THERE IS A LITTLE
8 INPUT THERE, WERE PEOPLE THAT WERE TOTALLY NEUTRAL
9 AT THAT TIME.

10 WELL, IN THE SAME MANNER, WHEN
11 THOSE WARNINGS WENT OUT, THE ONLY WARNINGS DIDN'T
12 SAY, DANGEROUS, THEY SAID MAY BE. AND THAT
13 REFLECTED THE CONTROVERSY OF THE TIME.

14 THAT WAS 1966.

15 AND 1969, THERE WAS A CAVE OF
16 SORTS. AND IN 1969 WAS THE YEAR THE STRONGER
17 WARNINGS WENT ON.

18 AND IN 1969, RIGHT AFTER THAT
19 THAT'S WHEN THE TELEVISION SHOWS STOPPED. THAT'S
20 WHEN THE ADS CAME OFF OF TELEVISION. THAT'S WHEN A
21 LOT OF STUFF CHANGED.

22 BUT BETWEEN 1954 WHEN ALL OF THIS
23 INFORMATION HAD BEEN AMASSED, AND 1969, 15 YEARS
24 LATER, TREMENDOUS, I MEAN, THINK ABOUT IT, A COUPLE
25 THOUSAND KIDS A DAY GETTING HOOKED, UNBELIEVABLE.
26 PEOPLE GOT HOOKED AND STATED HOOKED.

27 SO ANOTHER, ANOTHER ISSUE IN THIS
28 CASE IS A FAILURE TO WARN, AND THAT GOES RIGHT UP

5974

1 TO JULY 1, 1969, AND ENDS RIGHT THERE.

2 AND I SAY THAT IF THESE THINGS, IF
3 THE INDUSTRY HAD COME OUT, AND INSTEAD OF DUELING
4 WITH GOVERNMENT, INSTEAD OF CREATING DOUBT, INSTEAD
5 OF UNDERCUTTING THE SURGEON GENERAL, INSTEAD OF
6 B.S.'ING THE POPULOUS, SAID, YEAH, LIKE THEY HAVE
7 NOW IN THE YEAR 2001, YEP, WE DID IT, IT'S RIGHT,
8 IT'S TRUE.

9 I AM SAYING TO YOU THAT RICHARD
10 BOEKEN, AND UNTOLD TENS OF MILLIONS OF OTHER PEOPLE
11 WOULD NEVER HAVE SMOKED.
12 NOW, ANOTHER CAUSE OF ACTION ON
13 THIS CASE HAS TO DO WITH FLAW.
14 I PUT SOME OF THESE JURY
15 INSTRUCTIONS UP THERE YESTERDAY. THERE ARE A LOT
16 OF DIFFERENT KINDS OF FRAUD. THEY ALL FIT. I AM
17 NOT GOING TO DO IT AGAIN.
18 THIS LAW HERE THAT WE HAVE GOT IS
19 CALLED THE COMMON LAW AND I'D LIKE TO THINK IT
20 COMES FROM COMMON SENSE. IT'S DISTILLED FROM MAYBE
21 300 YEARS, STARTING IN ENGLAND, DISTILLED OVER A
22 PERIOD OF TIME. IT SORT OF CHANGE WITH THE TIMES.
23 BUT I THINK IF WE JUST THINK OF IT,
24 COMMON LAW, COMMON SENSE, IT'S A WAY TO GO.
25 SO DR. COBB HOFFMAN, I THINK,
26 HADN'T HEARD OF THE SCORPION AND THE FROG AND SO I
27 AM GOING TO TELL YOU ABOUT THE SCORPION AND THE
28 FROG.

5975

1 THE FROG WAS TAKING IT EASY,
2 MINDING ITS OWN BUSINESS ON THE SIDE OF THE RIVER,
3 STREAM, NOT HURTING ANYBODY.
4 AND THE SCORPION APPROACHED, AND
5 THE FROG WAS A LITTLE APPREHENSIVE.
6 THE SCORPION SAYS, "HOW ABOUT
7 GIVING ME A RIDE TO THE OTHER SIDE OF THE STREAM?"
8 THE FROG SAYS, "NOW, WHY WOULD I DO
9 THAT? YOU ARE A SCORPION, YOU COULD HURT ME."
10 THE SCORPION SAYS, "YEAH, BUT I AM
11 RIGHT HERE, RIGHT CLOSE TO YOU, I AM NOT HURTING
12 YOU. I COULD HURT YOU AND I AM NOT HURTING YOU, SO
13 I AM NOT GOING TO HURT YOU. DON'T WORRY ABOUT IT,
14 GIVE ME A RIDE ACROSS THE STREAM. I CAN'T SWIM.
15 YOU ARE FROG, YOU CAN SKIM. I AM A SCORPION, I
16 CAN'T SWIM. GIVE ME A RIDE OVER THERE."
17 "I DON'T KNOW ABOUT THAT."
18 THE SCORPION SAID, "LISTEN, YOU ARE
19 GOING TO GIVE ME A RIDE. I CAN'T SWIM. WE ARE
20 GOING TO BE IN THE WATER. I WON'T STING YOU, I
21 WILL DROWN. GIVE ME A RIDE."
22 THE FROG SAYS, "WHAT THE HECK, IT
23 SOUNDS LOGICAL TO ME."
24 THE SCORPION JUMPS ON THE FROG'S
25 BACK. THE SCORPION CAN'T SWIM. HE WANTS TO GET
26 ACROSS THE RIVER, THE STREAM. THE FROG GETS HIM TO
27 THE OTHER SIDE. THE SCORPION STINGS HIM. THE FROG
28 IS DYING. HE CAN'T BELIEVE THIS. HE SAID, "WHAT

5976

1 THE HELL DID YOU DO THAT FOR? I GAVE YOU A RIDE,
2 YOU PROMISED ME."
3 HE SAID, "I AM A SCORPION."
4 NOW, THAT'S WHAT THE DEFENSE OF
5 THIS CASE IS. PHILIP MORRIS ADMITS IT HAS SOLD A
6 DANGEROUS PRODUCT HERE IN THIS COUNTRY FOR OVER 50
7 YEARS. PHILIP MORRIS ADMITS THAT ITS PRODUCT MAKES
8 PEOPLE SICK. ANOTHER ONE OF ITS CORPORATE FAITH,
9 ELLEN MERLO, HAD A LITTLE BIT OF TROUBLE. AND I AM
10 SURE YOU ALL REMEMBER THAT, WHEN I SAID, WELL,
11 OKAY, YOUR PRODUCT IS DANGEROUS, YEAH.
12 YOUR PRODUCT MAKES PEOPLE SICK,
13 YEP.

14 YOUR PRODUCT KILLS PEOPLE. AND SHE
15 WENT (INDICATING), BECAUSE SHE FORGOT THERE WAS THE
16 NEW SCRIPT. THIS WAS THE NEW PHILIP MORRIS. THIS
17 WAS THE NEW STORY. AND SHE TOOK A LONG, HARD, LONG
18 PAUSE AND WENT, "YEP, RIGHT, IT KILLS PEOPLE."

19 ALL RIGHT. WELL, READ SOME OF
20 THESE JURY INSTRUCTIONS. YOU HAVE A PRODUCT THAT
21 KILLS PEOPLE.

22 NOW, MR. BOEKEN WAS REASSURED BY
23 THEM, AGAIN AND AGAIN AND AGAIN THAT THEY DIDN'T
24 KNOW THIS WAS DANGEROUS. THEY DIDN'T THINK IT WAS
25 DANGEROUS.

26 HERE IS AN OPEN QUESTION, MEDICAL
27 RESEARCH WAS OPEN, DOCTORS DISAGREE, SCIENTISTS
28 DISAGREE, IT COULD BE THE TAR, IT COULD BE THE

5977

1 CARS, IT COULD BE THE AIR POLLUTION, IT COULD BE
2 THE STRESS, IT COULD BE THE GENES, IT COULD BE
3 SOMETHING ABOUT YOU, WE DON'T KNOW THIS FOR SURE.

4 SO MR. BOEKEN IS ON THE OTHER SIDE
5 OF THE STREAM ALMOST, JUST LIKE THAT FROG, AND
6 PROFESSOR COBBS HOFFMAN SAYS, ANYONE THAT TRUSTED
7 THOSE GUYS ARE STUPID.

8 AND IT SORT OF REMINDS ME OF THE
9 SCORPION SAYING, HEY, TOUGH LUCK, CHARLIE, I AM A
10 SCORPION, TOUGH LUCK.

11 WELL, ON BEHALF OF THE FROG, HERE'S
12 WHAT I SAY. THE FROG IS AN INNOCENT BYSTANDER.
13 BUT IF THERE ARE PEOPLE AND SOME OF YOU MAY BE
14 THOSE PEOPLE WHO THINK, YOU KNOW WHAT, MAYBE
15 PROFESSOR COBBS HOFFMAN WAS A LITTLE BLUNT ABOUT IT
16 BUT MAYBE THERE IS SOMETHING TO WHAT SHE IS SAYING,
17 MAYBE PEOPLE SHOULD HAVE KNOWN, MAYBE PEOPLE SHOULD
18 HAVE, WHEN THEY HEARD A CHIEF EXECUTIVE OFFICER OF
19 THESE COMPANIES SAY SOMETHING, MAYBE THEY SHOULD
20 HAVE SAID, B.S.

21 OR MAYBE WHEN THEY BIT FOR THE
22 DISINFORMATION, THEY SHOULD HAVE BEEN A LITTLE
23 SMARTER, ALL FIVE MILLION, TEN MILLION, TWENTY
24 MILLION, HOWEVER MANY OF THE -- I THINK THERE ARE
25 FORTY MILLION PEOPLE NOW. OKAY, SO MAYBE SOME OF
26 YOU THINK MR. BOEKEN WASN'T CYNICAL ENOUGH AND
27 MAYBE SOME OF YOU THINK MR. BOEKEN GOT BLINDERS ON,
28 WHICH HE MAY HAVE. AND I ACKNOWLEDGE THAT. I

5978

1 ACKNOWLEDGE THAT SOME OF YOU MAY THINK THAT.

2 AND SO I SAY TO YOU, IF THAT FROG
3 WASN'T THE SMARTEST FROG IN THE WORLD, DOES THAT
4 MEAN THE SCORPION WINS?

5 OR DOES THAT MEAN, OKAY, THE FROG,
6 HE MIGHT HAVE BEEN PARTIALLY RESPONSIBLE, BUT THAT
7 SCORPION, THAT SCORPION CAN'T ESCAPE
8 RESPONSIBILITY.

9 SO TAKE A LOOK AT THIS, PLEASE.
10 THIS IS A JURY INSTRUCTION. THE JUDGE IS GOING TO
11 READ IT TO YOU. IT'S GOING TO GO IN THE JURY ROOM.
12 YOU ARE GOING TO SEE IT AND THIS IS WHAT CAUSES,
13 WHAT'S THE CAUSE OF DAMAGE? WHAT'S THE CAUSE OF AN
14 INJURY?

15 THE LAW DEFINES CAUSE IN ITS OWN
16 PARTICULAR WAY.

17 "A CAUSE OF INJURY, DAMAGE,
18 LOSS OR HARM IS SOMETHING THAT IS A

19 SUBSTANTIAL FACTOR IN BRINGING ABOUT
20 AN INJURY, DAMAGE, LOSS OR HARM."
21 SUBSTANTIAL FACTOR.
22 AND THIS IS THE NEXT INSTRUCTION.
23 AND FOR THOSE OF YOU THAT THINK, IF
24 ANY OF YOU DO, THAT THE FROG SHOULD HAVE KNOWN
25 BETTER, OKAY.
26 "THERE MAY BE MORE THAN ONE
27 CAUSE OF AN INJURY. WHEN NEGLIGENCE
28 OR WRONGFUL CONDUCT OF TWO OR MORE

5979

1 PEOPLE OR NEGLIGENT OR WRONGFUL
2 CONDUCT AND A DEFECTIVE PRODUCT
3 CONTRIBUTE CONCURRENTLY," AT THE SAME
4 TIME, CONCURRENTLY, "AS CAUSES OF AN
5 INJURY, THE CONDUCT OF EACH IS A CAUSE
6 OF THE INJURY, REGARDLESS OF THE
7 EXTENT TO WHICH EACH CONTRIBUTES TO
8 THE INJURY. A CAUSE -- " THIS IS
9 LEGALESE. I APOLOGIZE FOR THE PEOPLE
10 THAT WROTE THIS NEXT SENTENCE. "A
11 CAUSE IS CONCURRENT IF IT WAS
12 OPERATIVE AT THE TIME OF THE INJURY
13 AND ACTED WITH ANOTHER CAUSE TO
14 PRODUCE THE INJURY. IT IS NO DEFENSE
15 THAT THE NEGLIGENT OR WRONGFUL CONDUCT
16 OF A PERSON NOT JOINED AS A PARTY WAS
17 A CAUSE OF AN INJURY."
18 SO HERE'S THE TRANSLATION. IF TWO
19 PEOPLE -- DON'T FORGET, PHILIP MORRIS IS A PERSON
20 IN THE EYES OF THE LAW, PHILIP MORRIS CORPORATION,
21 PERSON IN THE EYES OF THE LAW. IF TWO PEOPLE, FOR
22 THOSE OF YOU WHO THINK THE FROG SHOULD HAVE KNOWN
23 BETTER, IF THE FROG SHOULD HAVE KNOWN BETTER, THE
24 SCORPION DOESN'T WIN, THE SCORPION STAYS.
25 NOW, YOU WILL NOT BE INSTRUCTED
26 ANYTHING ABOUT MR. BOEKEN'S NEGLIGENCE. THERE WILL
27 BE NO INSTRUCTION ABOUT THAT BECAUSE PHILIP
28 MORRIS --

5980

1 MR. LEITER: OBJECTION.
2 MR. PIUZE: CORRECT ME IF I AM WRONG.
3 MR. LEITER: I AM ASSERTING AN OBJECTION,
4 YOUR HONOR.
5 THE COURT: JUST ONE SECOND.
6 EXCUSE US, LADIES AND GENTLEMEN.
7 AS YOU KNOW, THIS DOESN'T HAPPEN VERY OFTEN.
8
9 (A DISCUSSION WAS HELD IN
10 CHAMBERS, NOT REPORTED.)
11
12 THE COURT: OKAY, LADIES AND GENTLEMEN,
13 JUST TAKE A DEEP BREATH AND IMAGINE THAT NEVER
14 HAPPENED. OKAY.
15 MR. PIUZE.
16 MR. PIUZE: THAT NEVER HAPPENED.
17 PHILIP MORRIS DOES NOT CLAIM
18 MR. BOEKEN IS NEGLIGENT.
19 PHILIP MORRIS DOES NOT CLAIM THAT
20 MR. BOEKEN WAS NEGLIGENT.
21 SO BACK TO THIS INSTRUCTION.
22 EVEN THOUGH PHILIP MORRIS DOESN'T
23 CLAIM THAT MR. BOEKEN WAS NEGLIGENT, EVEN THOUGH

24 THEY DON'T EVEN MAKE THAT CLAIM, I AM SHOWING YOU
25 THAT BECAUSE IF THE FROG WAS PARTIALLY RESPONSIBLE
26 FOR ITS GETTING STUNG, BECAUSE THE FROG WAS
27 TRUSTING, THE SCORPION DOES NOT GET OFF THE HOOK.
28 BECAUSE IF TWO DIFFERENT PEOPLE, PHILIP MORRIS AND

5981

1 MR. BOEKEN, THE SCORPION AND THE FROG, IF TWO
2 DIFFERENT PEOPLE OR IF TWO DIFFERENT SCORPION AND
3 FROG, ANIMALS, ARE RESPONSIBLE AT THE SAME TIME FOR
4 WHAT'S GOING ON, THEY ARE BOTH RESPONSIBLE.

5 AND THIS INSTRUCTION, 377, TELLS
6 YOU THAT.

7 IT TELLS YOU THAT IF ANY OF YOU
8 THINK THAT MR. BOEKEN, LIKE THE FROG, WAS TOO
9 TRUSTING, IF HE, IF WE WANT TO ADOPT A LIGHTER
10 VERSION OF WHAT PROFESSOR COBBS HOFFMAN SAID, THAT,
11 YOU KNOW, INSTEAD OF SAYING, IN EFFECT, WHO IN THE
12 WORLD WOULD TRUST THESE BOZOS, WHO IN THE WORLD
13 WOULD TRUST THESE BOZOS, IF WE TAKE A WATERED DOWN
14 VERSION, A LIGHTER VERSION OF THAT, AND WE SAY, YOU
15 KNOW, MAYBE THEY WEREN'T TELLING THE TRUTH, MAYBE
16 WE SHOULD HAVE FIGURED OUT THEY WEREN'T TELLING THE
17 TRUTH AND IF YOU THINK THAT APPLIES TO MR. BOEKEN,
18 OKAY, THAT SHOULD END IT. BUT THAT DOESN'T DEPRIVE
19 HIM OF COMPENSATION.

20 BECAUSE JUST LIKE THE SCORPION,
21 PHILIP MORRIS DOESN'T WALK, IF SOMEONE WAS GULLIBLE
22 ENOUGH TO BELIEVE, AND I SAY, FROM A MORAL POINT OF
23 VIEW, LET'S STOP THERE FOR A SECOND TOO, I'D JUST
24 LIKE TO TAKE MAYBE A MINUTE OR TWO ON THIS, STILL
25 WITH PROFESSOR COPS HOFFMAN.

26 I HOPE, I AM NOT GOING TO COME BACK
27 TO THIS AGAIN. BUT I HOPE, TRULY, EVEN PUTTING,
28 EVEN PUTTING THIS CASE ASIDE, I HOPE, TRULY, THAT

5982

1 IT HASN'T COME TO THAT, THAT WE CAN'T TRUST
2 ANYTHING THAT ANYONE SAYS ABOUT ANYTHING ANY TIME,
3 ANY PLACE, ANYHOW.

4 IF MR. BOEKEN WAS TOO GULLIBLE OR
5 IF MR. BOEKEN WAS SO ADDICTED THAT HE RATIONALIZED,
6 THAT HE WOULD GRAB ONTO WHAT THEY TOLD HIM, THAT HE
7 WOULD BITE FOR THIS, HOOK, LINE AND SINKER, THAT
8 DOESN'T ELIMINATE HIM FROM COMPENSATION IN THIS
9 CASE AT ALL.

10 I READ SOME OF THESE MEMOS HERE.
11 THEY ARE SO CYNICAL. AND I SEE IT LIKE, ONE IN
12 PARTICULAR YESTERDAY THAT SAID WE ARE GOING TO
13 TARGET THIS TO TOBACCO STATE CONGRESSMEN AND TO
14 HEAVY SMOKERS.

15 THIS IS THE ROPER PROPOSAL, EXHIBIT
16 330, ROPER PROPOSAL, WE ARE GOING TO TARGET TOBACCO
17 STATE CONGRESSMEN AND HEAVY SMOKERS.

18 AND I SEE IT AS A FISHERMAN
19 THROWING, THROWING A BUNCH OF LINES OVERBOARD.

20 AND SOME OF THE FISH ARE GOING TO
21 BITE AND SOME OF THE FISH AREN'T GOING TO BITE.

22 AND SO HERE'S THE FISHERMAN
23 THROWING THE LINE OVERBOARD, AND FOR THE ONES THAT
24 BITE, THE FISHERMAN, IN THIS CASE, PHILIP MORRIS,
25 SAYS, DUMB S.O.B., YOU DON'T DESERVE ANYTHING,
26 SHOULDN'T HAVE BIT.

27 SO I THINK I AM DONE WITH THAT.
28 THAT'S WHAT CAUSES, THERE CAN BE MORE THAN TWO

1 CAUSES GOING AT THE SAME TIME.
2 AND NOW ANOTHER ISSUE IN THIS CASE,
3 ANOTHER LEGAL ISSUE IN THIS CASE HERE, ANOTHER
4 THEORY HAS TO DO WITH DESIGN DEFECT.
5 AND THIS IS WHAT'S KNOWN AS PRODUCT
6 LIABILITY, SOMETIMES STRICT LIABILITY.
7 HERE'S A LITTLE BIT OF LEGALESE BUT
8 I WOULD JUST LIKE TO GO THROUGH IT WITH YOU
9 QUICKLY.
10 AND LET ME SAY SOMETHING ELSE IF I
11 COULD.
12 THE JUDGE WILL TELL YOU ABOUT
13 BURDEN OF PROOF. HE MIGHT HAVE MENTIONED IT
14 EARLIER IN THE CASE.
15 BUT THERE IS SUCH A THING AS BURDEN
16 OF PROOF. I HAVE WATCHED SOME OF YOU LADIES
17 SITTING OUT ON THE BENCH THERE AND RIGHT ABOVE
18 WHERE YOU HAVE BEEN SITTING EVERY DAY IS THIS SEAL.
19 AND IT'S GOT LADY JUSTICE UP THERE.
20 AND LADY JUSTICE HAS SOME SCALES IN
21 ONE HAND WHICH I WANT TO TALK ABOUT NOW. AND LADY
22 JUSTICE HAS A BIG OLD SWORD IN THE OTHER HAND WHICH
23 I WANT TO TALK ABOUT IN A LITTLE WHILE.
24 BUT THE SCALE OF JUSTICE, THE
25 BURDEN OF PROOF, HERE'S HOW I VISUALIZE IT.
26 EVERYONE STARTS OUT EVEN. AND THIS
27 IS A CIVIL CASE RIGHT HERE. IT'S NOT A CRIMINAL
28 CASE.

1 AND IN A CRIMINAL CASE, IN THE
2 UNITED STATES OF AMERICA, WHEN THE PROSECUTOR WHO
3 SITS OVER HERE, STANDS UP, AND HE IS TRYING TO PUT
4 SOMEONE OR SHE IS TRYING TO PUT SOMEONE IN PRISON
5 OR TAKE THEIR LIFE, THE BURDEN OF PROOF IS BEYOND A
6 REASONABLE DOUBT. AND THE WAY I VISUALIZE THIS IS
7 SORT OF 99 TO 1, LIKE THAT, BEYOND A REASONABLE
8 DOUBT.
9 THIS IS AMERICA. LIFE, LIBERTY,
10 PURSUIT OF HAPPINESS. LIFE, LIBERTY, MORE
11 IMPORTANT THAN PROPERTY. LIFE, LIBERTY, MOST
12 IMPORTANT. IF WE ARE GOING TO TAKE SOMEONE'S
13 LIBERTY BY PUTTING THEM IN PRISON, TAKE SOMEONE'S
14 LIFE, THERE BETTER BE DARN WELL PROOF BEYOND
15 REASONABLE DOUBT BEFORE YOU DO IT.
16 THIS IS A CIVIL CASE HERE. NO ONE
17 IS GOING TO JAIL. NO ONE IS GOING TO PRISON. NO
18 ONE'S LIFE IS BEING TAKEN. NO ONE IS GOING TO
19 PRISON. THERE HAVE BEEN ENOUGH LIVES BEING TAKEN
20 ALREADY.
21 MAYBE THIS WILL STOP SOMEONE ELSE'S
22 LIVE FROM BEING TAKEN.
23 BUT AS THE COURT WILL SAY, IN A
24 CIVIL CASE, IT'S THE PREPONDERANCE OF THE EVIDENCE.
25 WHAT IT MEANS IS ONE SIDE TIPS THE
26 SCALES A LITTLE, 51, 49.
27 SO I HAVE, ON BEHALF OF MR. BOEKEN,
28 THE BURDEN OF PROOF ON MOST ISSUES IN THIS CASE.

1 AND THE BURDEN OF PROOF IS BY A
2 PREPONDERANCE OF THE EVIDENCE.
3 51, 49. WHAT IS MORE LIKELY THAN
4 NOT.

5 NONE OF THIS, NO ONE IS GOING TO
6 PRISON, NO ONE IS GETTING THE DEATH PENALTY. 51,
7 49.

8 THERE IS ANOTHER ISSUE I AM GOING
9 TO COME BACK LATER ON AND SAY SOMETHING DIFFERENT
10 ABOUT, AND THAT'S THE SWORD ISSUE.

11 BUT ON WHETHER THERE WAS A FRAUD,
12 WHETHER PHILIP MORRIS DEFRAUDED, WHETHER PHILIP
13 MORRIS MADE FALSE PROMISES, WHETHER PHILIP MORRIS
14 CONCEALED, WHETHER PHILIP MORRIS WAS NEGLIGENT, ON
15 THE STRICT LIABILITY THING I AM ABOUT TO TALK
16 ABOUT, 51, 49, IS IT MORE LIKELY THAN NOT.

17 SO HERE IT IS. FOR MR. BOEKEN, I
18 HAVE TO PROVE THAT MR. BOEKEN HAS TO PROVE THAT
19 PHILIP MORRIS WAS THE MANUFACTURER OF MARLBOROS,
20 THAT MARLBOROS POSSESSED A DEFECT IN DESIGN, THAT
21 THE DEFECT WHICH -- WHICH I AM GOING TO TALK
22 ABOUT -- THAT THE DEFECT IN DESIGN EXISTED AT THE
23 TIME IT LEFT DEFENDANT'S POSSESSION.

24 AND WHAT THIS ONE MEANS IS, YOU
25 KNOW, FOR SOME PRODUCTS WE GET THEM TO OUR HOUSE
26 AND WE ALTER THEM AND MODIFY THEM AND DO SOMETHING
27 TO IT AND IT CHANGES THEM. WE ARE TALKING ABOUT A
28 STRAIGHT CIGARETTE RIGHT OUT OF THE BOX HERE.

5986

1 THAT THE DEFECT IN DESIGN WAS A
2 CAUSE OF INJURY TO PLAINTIFF.

3 SO LET'S STOP THERE.

4 AS IT TURNS OUT, PHILIP MORRIS DOES
5 NOT DISPUTE, IN THIS CASE, THAT MR. BOEKEN'S
6 ADENOCARCINOMA WAS CAUSED BY SMOKING THE MARLBOROS,
7 AS IT TURNS OUT.

8 HERE'S THE PATHOLOGY REPORT.
9 PAPILLARY ADENOCARCINOMA OF THE LUNG, MODERATELY
10 WELL-DIFFERENTIATED.

11 WE HAD A LITTLE TALK ALONG THE WAY
12 ABOUT SOMETHING CALLED BRONCHIOLOALVEOLAR
13 CARCINOMA. BUT NOTHING EVER MATERIALIZED ON THAT.

14 EVERY DOCTOR IN THIS CASE WHO CAME
15 HERE SAID MR. BOEKEN'S LUNG CANCER WAS CAUSED BY
16 SMOKING CIGARETTES.

17 THAT INCLUDED HIS TREATING
18 PHYSICIAN, DR. SARNA. DR. SARNA JUST HAPPENED TO
19 BE A FULL PROFESSOR OF ONCOLOGY OVER AT UCLA. IT
20 ALSO INCLUDED DOCTOR -- YOU KNOW, THESE PEOPLE THAT
21 I HAD IN HERE, THESE UNBELIEVABLE GREAT DOCTORS.

22 ANYWAY, IT'S NO DISPUTE. THE
23 PRODUCT CAUSED THE CANCER.

24 PLAINTIFF'S INJURY RESULTED FROM A
25 USE OF THE PRODUCT THAT WAS REASONABLY FORESEEABLE,
26 SMOKING.

27 SO OF THE ONE, TWO, THREE, FOUR,
28 FIVE OF THE FIVE ISSUES, THE ONLY ONE THAT'S GOING

5987

1 TO BE IN DISPUTE HERE IS NUMBER 2, THAT THE PRODUCT
2 POSSESSED A DEFECT IN ITS DESIGN.

3 AND WHAT'S THAT?

4 A DESIGN DEFECT IS ONE OF TWO, A OR
5 B. IT DOESN'T HAVE TO BE BOTH. IT CAN BE A, IT
6 CAN BE B. IT CAN BE B. IT CAN BE A. IT CAN BE
7 BOTH. IT DOES NOT HAVE TO BE BOTH.

8 "A, A PRODUCT IS DEFECTIVE
9 IN DESIGN: IF IT FAILS TO PERFORM AS

10 SAFELY AS AN ORDINARY CONSUMER WOULD
11 EXPECT WHEN USED IN AN INTENDED OR
12 REASONABLY FORESEEABLE MANNER."
13 SO LET'S STOP THERE.
14 LET'S JUST TALK ABOUT A.
15 IN 1954, WHEN MR. BOEKEN PICKED UP
16 THAT BUTT OUT OF THE ASHTRAY, IN 1957, WHEN HE
17 STARTED SMOKING, PHILIP MORRIS HAS SAID IN ITS
18 INTERNET WEBB, MEDIA PRESS RELEASE, THAT MR. BOEKEN
19 SHOULD HAVE KNOWN THEN, BEFORE HE PICKED UP THAT
20 FIRST CIGARETTE. AND I TAKE DIRECT ISSUE WITH
21 THAT.

22 AND I WILL ONLY TAKE A MINUTE TO
23 OBSERVE, I TALKED ABOUT IT YESTERDAY. IT'S A
24 PRETTY AMAZING SITUATION WHERE THEY COME IN. WE
25 PIONS SHOULD HAVE KNOWN ALL THIS STUFF, BUT THEIR
26 SCIENTISTS DIDN'T HAVE TO KNOW. THEIR DOCTORS
27 DIDN'T HAVE TO KNOW IT. THEIR EXECUTIVES DIDN'T
28 HAVE TO KNOW IT, BUT WE HAVE TO KNOW IT. STUPID

5988

1 BEYOND BELIEF.
2 ALL THE WAY FROM 1954, WHEN HE
3 PICKED UP THAT FIRST PUFF, TO 1957, WHEN HE STARTED
4 SMOKING, IMMEDIATELY WENT TO TWO PACKS A DAY, OR
5 ONE TO TWO PACKS A DAY, ALL THE WAY UP UNTIL 1964
6 IN JANUARY -- LET'S STOP THERE. I AM GOING TO USE
7 THEIR MEDICAL EXPERT, DR. LUDMERER. DR. LUDMERER
8 SAYS, EVEN SMART, PH.D., GENIUS, PROFESSORS,
9 DOCTORS, THE BEST PEOPLE OUT THERE, EVEN THEY
10 WEREN'T SUPPOSED TO KNOW THAT THIS STUFF CAUSED
11 CANCER UNTIL JANUARY 1ST, 1964 WHEN THERE WAS A
12 CONSENSUS.

13 SO LET'S JUST USE THAT FOR
14 STARTERS.

15 AND I WANT YOU TO JUST ASSUME FOR A
16 SECOND THAT ON JANUARY 1ST, 1964, PHILIP MORRIS
17 STOOD BEHIND THE SURGEON GENERAL AND SAID, RIGHT,
18 WE AIN'T WAITING FOR 2001, RIGHT, WE AGREE.

19 FOR THOSE YEARS UP UNTIL 1964, THAT
20 PRODUCT UNDOUBTEDLY FAILED TO PERFORM AS AN
21 ORDINARY CONSUMER WOULD EXPECT BECAUSE THE CONSUMER
22 WAS PLUNKING DOWN HIS OR HER GOOD MONEY BUYING
23 POISON.

24 NOW LET'S LOOK AFTER 1964.
25 LET'S LOOK ALL THE WAY, I WILL GIVE
26 YOU ANOTHER CHUNK OF TIME, LET'S GO ALL THE WAY UP
27 INTO 1969 WHEN A WARNING WENT ON THERE THAT SAYS
28 THIS STUFF DOES CAUSE DISEASE, FIVE YEARS LATER.

5989

1 FOR THOSE FIVE YEARS, THAT PRODUCT
2 FAILED TO PERFORM AS AN ORDINARY CONSUMER WOULD
3 EXPECT WHEN THEY SMOKED IT.

4 AND NOW LET'S TAKE ANOTHER BLOCK OF
5 TIME. AND THIS BLOCK OF TIME ENDED LAST YEAR.

6 I DON'T KNOW WHAT AN ORDINARY
7 CONSUMER IS, BUT HALF THE PEOPLE HAVEN'T STOPPED
8 SMOKING.

9 AS LONG AS THERE WAS DOUBT OUT
10 THERE THAT WAS BEING CREATED, AS LONG AS THEY WERE
11 SENDING THEIR EXECUTIVES BEFORE CONGRESS, AS LONG
12 AS THEY WERE TURNING IN PROPAGANDA TO THE UNITED
13 STATES CONGRESS IN '84, AS LONG AS THEY WERE
14 CREATING DOUBT, AS LONG AS THEY HAD PROFESSOR

15 HOSHIZAKIS AROUND TO SAY WE STILL DON'T KNOW, WE
16 STILL DON'T KNOW IF THIS REALLY IS TRUE.
17 AS LONG AS THERE WERE DOUBTS
18 CREATED ABOUT THE HEALTH CHARGE, NICE WAY OF
19 PUTTING IT, THE HEALTH CHARGE, YOUR LIFE, AS LONG
20 AS THERE WERE DOUBTS CAUSED ABOUT THE HEALTH
21 CHARGE, I SAY THAT AN ORDINARY CONSUMER COULD
22 EXPECT OTHERWISE.
23 BUT I CAN SEE WHERE SOME OF YOU
24 WILL DISAGREE ON THAT.
25 NEXT, DIFFERENT ISSUE.
26 UP UNTIL SIX WEEKS AGO,
27 APPROXIMATELY, OR EIGHT WEEKS AGO, ORDINARY
28 CONSUMERS DID NOT KNOW THAT RED EQUALED GOLD,

5990

1 EQUALED PLATINUM. ORDINARY CONSUMERS DIDN'T KNOW
2 THAT. ORDINARY CONSUMERS WOULD EXPECT AND WERE LED
3 TO BELIEVE, AND DID BELIEVE, THAT RED DID NOT EQUAL
4 THESE OTHERS, AND THAT IT WAS BETTER TO SMOKE THESE
5 OTHERS, AND IT WAS ALWAYS WRONG FROM DAY ONE.

6 NOW, IF A PRODUCT FAILS TO PERFORM
7 AS SAFELY AS AN ORDINARY CONSUMER WOULD EXPECT,
8 WHEN THE CIGARETTE IS USED IN AN ORDINARY, INTENDED
9 OR REASONABLY FORESEEABLE MANNER, WE HAVE JUST RUN
10 THE BOARD AND ALL FIVE THINGS HAVE BEEN
11 ESTABLISHED.

12 THEY WERE THE MANUFACTURER. IT WAS
13 DEFECTIVE. THE DEFECT EXISTED WHEN IT LEFT THE
14 FACTORY IN THE PACKAGE. IT WAS A CAUSE OF INJURY
15 TO PLAINTIFF. AND THE INJURY RELATED FROM A USE OF
16 THE PRODUCT THAT WAS REASONABLY FORESEEABLE;
17 NAMELY, YOU LIT IT AND SMOKED IT.

18 AND THAT'S A WRAP. ALTERNATIVELY,
19 AND THIS IS AN ALTERNATIVE, WE DON'T NEED BOTH.

20 "A PRODUCT IS DEFECTIVE IN
21 DESIGN: IF THE RISK OF DANGER
22 INHERENT IN THE DESIGN -- EXCUSE ME --
23 IF THERE IS A RISK OF DANGER INHERENT
24 IN THE DESIGN WHICH OUTWEIGHS THE
25 BENEFITS OF THE DESIGN.

26 "IN DETERMINING WHETHER THE
27 BENEFITS OF THE DESIGN WOULD OUTWEIGH
28 SUCH RISKS, YOU MAY CONSIDER, AMONG

5991

1 OTHER THINGS, THE GRAVITY OF THE
2 DANGER."

3 WELL, YOU CAN'T GET MUCH MORE GRAVE
4 THAN DYING SLOWLY AND PAINFULLY FROM LUNG CANCER.

5 "THE LIKELIHOOD THAT SUCH
6 DANGER WOULD CAUSE DAMAGE."

7 WELL, THE BODY COUNT IS 17 MILLION
8 PEOPLE SINCE 1964.

9 "THE MECHANICAL FEASIBILITY
10 OF A SAFER ALTERNATIVE DESIGN AT THE
11 TIME OF MANUFACTURE."

12 AND THAT'S WHERE WE ARE GOING TO
13 SPEND A COUPLE MINUTES. I WILL COME BACK.

14 "THE EXISTENCE OR
15 NON-EXISTENCE OF WARNINGS. THE
16 FINANCIAL COST OF AN IMPROVED DESIGN,
17 AND THE ADVERSE CONSEQUENCES TO THE
18 PRODUCT AND THE CONSUMER THAT WOULD
19 RESULT FROM THE ALTERNATIVE DESIGN."

20 THE LAST THING, ADVERSE
21 CONSEQUENCES, AND THE MECHANICAL FEASIBILITY GO
22 TOGETHER.
23 I READ YOU A PORTION OF
24 DR. FARONE'S DEPOSITION YESTERDAY WHERE HE SAID
25 THERE CAN BE A SAFE CIGARETTE, THERE AREN'T ANY ON
26 THE MARKET NOW BUT THERE CAN BE.
27 AND I WANT TO -- THIS WILL EITHER
28 BE THE LAST OR THE NEXT TO LAST THING I READ OUT OF

5992

1 THIS DEPOSITION.
2 MR. LEITER: PAGE, PLEASE.
3 MR. PIUZE: 1520.
4 MR. LEITER: THANK YOU.
5 MR. PIUZE: OKAY. HE IS TALKING ABOUT
6 POTASSIUM NITRATE ALSO KNOWN AS SALT PETER.
7 THE NOD PROGRAM, N-O-D, PROGRAM
8 THAT YOU HEARD ABOUT HAS TO DO WITH NITRATES.
9 "WHEN YOU BURN THAT, IT
10 GIVES OFF OXIDES OF NITROGEN, THE
11 STUFF THAT CAUSES THE BROWN HAZE ON
12 BAD POLLUTION DAYS IN L.A. WHEN YOU
13 LOOK OUT OVER THE HORIZON, THAT'S THE
14 NASTY STUFF WE DON'T WANT.
15 "THAT STUFF ALSO REACTS WITH
16 NICOTINE IN THE SMOKE TO MAKE THINGS
17 CALLED NITROSAMINES WHICH ARE DEADLY
18 CARCINOGENS.
19 "SO THE IDEA WAS, IF WE
20 REMOVED NITRATE FROM THE SHEET, THIS
21 ARTIFICIAL RECONSTITUTED TOBACCO, AND
22 WE USED THAT IN THE CIGARETTES, THAT
23 WE COULD REDUCE THE AMOUNT OF BAD
24 STUFF.
25 "IN FACT, WE PREPARED SOME
26 OF THAT SHEET. IT WAS MADE INTO
27 MARLBORO TYPE CIGARETTES AND THAT'S
28 THE ONLY TIME IN MY EIGHT-YEAR CAREER

5993

1 WHERE I ACTUALLY SAW THE RESULT OF A
2 TEST ON MARLBORO WAS A MARLBORO TEST
3 RUN WITH THE NORMAL WAY WE MAKE IT
4 PLUS THIS MODIFIED, RECONSTITUTED
5 SHEET. AND THAT WAS TESTED IN
6 GERMANY, AS I UNDERSTAND IT. THERE
7 DR. OSDENE, WHO SHOWED ME A DOCUMENT,
8 THAT SHOWED THAT IT WAS LESS
9 CARCINOGENIC.
10 THE MODIFICATION, THAT NITRATE
11 REMOVED MATERIAL, ALL OF THE NITRATES REMOVED.
12 THAT WAS AROUND 1979.
13 THE MODIFICATION WAS NEVER PUT INTO
14 EFFECT.
15 AND WHERE HE GOES ON TO DISCUSS WHY
16 THIS TESTING WAS DONE OVERSEAS, BECAUSE THERE WAS A
17 GENTLEMAN'S AGREEMENT THAT PREVENTED THEM FROM
18 DOING IT. THERE WAS ALSO THE IDEA THAT THEY DIDN'T
19 WANT THE DOCUMENTS. HE TALKS ABOUT SENDING HOME
20 AND DESTROYING THEM.
21 "THE DOCUMENT I JUST TALKED
22 ABOUT WHERE I SAID THAT I SAW THE
23 RESULT OF THE MARLBORO VERSUS -- HE
24 TOOK THAT DOCUMENT BACK FROM ME AND

25 SAID I SHOULDN'T HAVE SHOWN YOU THIS,
26 I HAVE TO DESTROY IT.
27 "AND HE TOLD ME HIS GENERAL
28 POLICY WAS TO HAVE ALL THE DOCUMENTS

5994

1 THAT CONTAINED INFORMATION THAT THEY
2 DIDN'T WANT TO BE DISCOVERABLE IN THE
3 UNITED STATES, WAS TO SEND IT TO HIS
4 HOUSE."

5 ANYWAY, THERE WAS A PROGRAM, AND
6 THE PROGRAM WAS TO REMOVE THIS STUFF THAT CAUSED
7 THE BROWN HAZE OVER L.A. ON BAD POLLUTION DAYS, AND
8 IT WAS TESTED TIME AND PHILIP MORRIS DENIES THE
9 EXISTENCE OF THIS TEST AND DR. FARONE SAYS THAT
10 REDUCED CANCER IN THESE CIGARETTES, DR. FARONE
11 SAYS, THEY COULD MAKE A SAFE CIGARETTE.

12 I TALKED ABOUT THE CAMBRIDGE
13 CIGARETTE THE OTHER DAY. JUST LET ME SHOW YOU THIS
14 LITTLE TAKE. 30 SECONDS.

15 YOU ARE GOING TO HAVE AN EXHIBIT
16 THAT SHOWS WHERE DR. WHIDBY DREW THE CAMBRIDGE TAR
17 LINE AT THE BOTTOM, BOTTOM, BOTTOM, BOTTOM OF THE
18 PAGE. IT WAS ALMOST A SUBMARINE UNDER SEA.

19 YOU KNOW MY VIEWS ON WHY THEY
20 DIDN'T TRY TO BUILD A SAFER CIGARETTE, BECAUSE A
21 SAFER CIGARETTE WOULD KILL THE BRAND NAME.

22 BACK TO THIS JURY INSTRUCTION.
23 THE SECOND WAY OF GETTING TO
24 DANGEROUS AND DEFECTIVE PRODUCT, EXCUSE ME,
25 DEFECTIVE PRODUCT, IS THAT IF THERE WAS A RISK OF
26 DANGER INHERENT IN THE DESIGN WHICH OUT-WEIGHED THE
27 BENEFIT OF THE DESIGN.

28 IN THIS ONE PARTICULAR SITUATION

5995

1 HERE, AND ONLY THIS SITUATION, THE DEFENDANT HAS,
2 PHILIP MORRIS HAS A BURDEN OF PROOF IN THIS ONE
3 SITUATION IN THE CASE.

4 THE ESSENTIAL ELEMENTS OF A CLAIM
5 BASED UPON A DESIGN DEFECT FROM FAILURE TO WARN,
6 THIS IS THE THIRD PRODUCTS LIABILITY ISSUE.

7 PHILIP MORRIS WAS THE MANUFACTURER;
8 NAMELY CIGARETTES. PRODUCT WAS DEFECTIVE. THE
9 DEFECT CAUSED AN INJURY TO THE PLAINTIFF, AND THE
10 PLAINTIFF'S INJURY RESULTED FROM THE USE OF THE
11 PRODUCT THAT WAS REASONABLY FORESEEABLE.

12 IN THIS CASE, A PRODUCT IS
13 DEFECTIVE IF THE MANUFACTURER HAD A DUTY TO WARN OF
14 DANGERS AND FAILS TO PROVIDE AN ADEQUATE WARNING OF
15 THE DANGER BEFORE JULY 1, 1969.

16 AND IT GOES ON TO TALK ABOUT IT.

17 THE PRODUCT WAS DEFECTIVE UNDER THE
18 LAW, UNDER ALL THREE.

19 UNDER CONSUMER EXPECTATION, IT'S A
20 DEAD BANG.

21 UNDER FAILURE TO WARN, IT'S AN
22 ABSOLUTE DEAD BANG UP UNTIL JULY 1ST, 1969.

23 AND THE DESIGN DEFECT, IT'S A
24 CLOSER CALL BECAUSE I REALIZE, THIS IS THE ONLY
25 THING THAT'S CONTESTED.

26 THEY SAY THEY CAN'T -- THEY SAY
27 THEY CAN'T MAKE A SAFER CIGARETTE.

28 AND MY WITNESS, WHO USED TO WORK

5996

1 FOR THEM, AND WAS A HIGH-RANKING BOSS SAYS,
2 BOLONEY.
3 AND THE QUANDARY, BECAUSE THEY
4 WOULDN'T ADMIT THAT THIS STUFF CAUSED CANCER, THEY
5 DIDN'T DO BIOLOGIC TESTS, THEY LOST 35 VALUABLE
6 YEARS, MINIMUM, TESTING THIS STUFF, 35 VALUABLE
7 YEARS MINIMUM, GAVE UP 35 YEARS' WORTH OF TESTING
8 TO MAKE A CIGARETTE SAFE.
9 AND PLAINTIFF ALSO CLAIMS IN THIS
10 CASE THAT PHILIP MORRIS WAS NEGLIGENT, AND THAT'S
11 ANOTHER REASON WHY THEY ARE NEGLIGENT BECAUSE THEY
12 DIDN'T TEST.
13 NOW, I WANT TO TALK ABOUT
14 MR. BOEKEN.
15 HERE, IN THIS HIGH TECH CASE OF
16 OURS, HERE'S EXHIBIT 80508.2, WHICH YOU WON'T HAVE
17 IN THE JURY ROOM.
18 DR. DOLL'S COLLEAGUE, DR. PETO,
19 FROM CAMBRIDGE, ENGLAND, HAS THIS CHART IN ONE OF
20 HIS LATEST SCIENTIFIC PAPERS.
21 DR. FEINGOLD FROM MIAMI, DREW THIS
22 CHART FOR YOU. IT'S RIGHT OUT OF, I BELIEVE IT'S
23 RIGHT OUT OF DR. PETO'S PAPER.
24 AND THIS CHART SHOWS WHAT HAPPENS
25 IF YOU SMOKE AND IF YOU QUIT. AND UNFORTUNATELY,
26 ONE OF THE THINGS THIS CHART SHOWS IS THAT IF YOU
27 QUIT, YOUR RISKS OF GETTING LUNG CANCER DON'T GO
28 DOWN, THEY STAY WHERE THEY WERE, WHEN YOU QUIT.

5997

1 BUT THEY DON'T GO DOWN.
2 AND SO, FOR INSTANCE, THIS 75, THE
3 END OF THE CHART IS SOMEONE WHO IS 75 YEARS OLD.
4 AND IF SOMEONE KEEPS SMOKING RIGHT
5 UP UNTIL THE TIME THEY ARE 75 YEARS OLD, THEIR RISK
6 IS HIGHER THAN SOMEONE WHO QUILTS AT 65 OR 55, OR
7 WHEREVER.
8 BUT WHAT HAPPENS IS, WHEN SOMEONE
9 GETS OFF THE TRAIN, AND SOMEONE QUILTS, WHEN SOMEONE
10 CAN KICK THE HABIT, THEIR ODDS OF GETTING LUNG
11 CANCER DO NOT GO DOWN. THEY STAY WHERE THEY ARE.
12 AND THAT'S NOT CONTESTED IN THIS
13 TRIAL.
14 SO ANYWAY, NOT A NICE THOUGHT.
15 BUT MR. BOEKEN, IF HE HAD TO QUIT
16 IN 1989, WHEN HE WAS 45 YEARS OLD, HE ALREADY HAD
17 CANCER. IT WAS TOO LATE FOR HIM.
18 IF MR. BOEKEN HAD QUIT WHEN HE WAS
19 45, ANY TIME AFTER 45, WOULDN'T HAVE MATTERED TO
20 HIM, BECAUSE HE ALREADY HAD CANCER. IT WAS JUST A
21 MATTER OF MANIFESTING.
22 PEOPLE WHO GOT THE MESSAGE, AS SOME
23 OF THE DEFENSE WITNESSES SAY, AND QUIT, ARE NOT OUT
24 OF THE WOODS.
25 THERE'S HIS TUMOR. NOT VERY BIG
26 TUMOR. RIGHT UPPER LOBE. THAT TUMOR METASTASIZED.
27 THE MEDICAL CARE HE GOT WAS ABSOLUTELY FINE. SOME
28 OF THE FINEST PEOPLE IN THIS CITY TREATED HIM,

5998

1 COULDN'T HELP HIM. PROLONGED HIS LIFE. AND ONCE
2 THAT SPREAD TO HIS LOWER BACK, THE HANDWRITING WAS
3 DEFINITELY ON THE WALL.
4 WHEN IT WAS FOUND THAT THERE WERE
5 LYMPH NODES, RIGHT AWAY, WITHIN THE FIRST COUPLE

6 WEEKS, HE WAS TOLD THE LYMPH NODES WERE INVOLVED,
7 HANDWRITING WAS ON THE WALL. HANDWRITING WENT TO
8 CAPITAL LETTERS. AND METASTASIZED TO HIS LOW BACK
9 IN AUGUST OF 2000, AND THE HANDWRITING BECAME
10 OVERWHELMING, AROUND NOVEMBER OR DECEMBER OF 2000,
11 WHEN HE WAS DIAGNOSED WITH METASTASIS TO THE BRAIN.

12 HERE YOU GO. AND HE HAD,
13 UNFORTUNATELY FOR HIM, MULTIPLE LESIONS IN THE
14 BRAIN. THIS IS THE COMMON -- WE HEARD FROM
15 DR. FEINGOLD AND I THINK FROM DR. STRAUSS AND FROM
16 DR. SARNA. THIS IS COMMON. THIS IS THE WAY IT
17 WORKS. LUNG CANCER IS THE PRIMARY CANCER THAT'S
18 CAUSED BY TOBACCO SMOKE. METASTASIZES TO DIFFERENT
19 PARTS OF THE BODY. THIS IS ONE OF THE FAVORITE
20 PLACES RIGHT HERE, TO THE BRAIN.

21 AND MR. BOEKEN HAS BRAIN CANCER,
22 LOW BACK CANCER, LUNG CANCER, AND IT'S A FATAL
23 ILLNESS.

24 THERE IS NO CURE. BUT HE IS BEING
25 TREATED THE BEST HE POSSIBLY CAN BE.

26 I'D LIKE TO SPEND SOME MINUTES --
27 YOUR HONOR, JUST GIVE ME A CLUE, CAN WE GO TO
28 QUARTER OF? IS THIS WHERE WE GO TO?

5999

1 THE COURT: IT'S UP TO YOU. I AM NOT
2 PUTTING ANY LIMITS ON EITHER SIDE. IF YOU WOULD
3 LIKE TO TAKE A BREAK, WE WILL DO THAT. I EXTEND
4 THE SAME COURTESY TO THE OTHER SIDE.

5 MR. LEITER: THANK YOU, YOUR HONOR.

6 MR. PIUZE: WELL, YOU ARE THE JURY, YOU
7 GOT TO VOTE, NOW OR 15 MINUTES FROM NOW.

8 JUROR: DO IT NOW.

9 MR. PIUZE: YOUR HONOR, I THINK I WOULD
10 LIKE TO TAKE A BREAK NOW.

11 THE COURT: LADIES AND GENTLEMEN, TAKE
12 OUR BREAK. BE BACK AT QUARTER TIL 11:00.

13
14 (AT THIS TIME, A RECESS
15 WAS TAKEN.)

16
17 (THE FOLLOWING PROCEEDINGS
18 WERE HELD IN OPEN COURT IN
19 THE PRESENCE OF THE JURY.)

20
21 THE COURT: MR. PIUZE.
22 MR. PIUZE: THANKS.

23
24 OPENING ARGUMENT (CONTINUED)

25
26 BY MR. PIUZE:
27 I AM GOING TO SPEND LESS THAN FIVE
28 MINUTES TOUCHING ON A COUPLE ISSUES OF LIABILITY

6000

1 AND I AM NOT COMING BACK. PROMISE.
2 THIS IS DR. FARONE HERE. HE'S
3 COMMENTING ON THAT LIGHT CIGARETTE EXHIBIT I JUST
4 PUT OUT. AND HE'S QUOTING IT.

5 "MARLBORO 85 SMOKERS IN THE
6 STUDY DID NOT ACHIEVE ANY REDUCTION IN
7 SMOKE INTAKE BY SMOKING A CIGARETTE,
8 SUCH AS MARLBORO LIGHTS, NORMALLY
9 CONSIDERED LOWER IN DELIVERY."

10 HE EXPLAINS THAT. WHAT DOES IT

11 MEAN?
12 "ACCORDING TO THEIR HUMAN
13 SMOKE SIMULATOR STUDIES, ACCORDING TO
14 THE WAY PEOPLE SMOKED, THAT SMOKING
15 THAT RED MATERIAL, YOU GET A CERTAIN
16 DELIVERY LEVEL. WHEN YOU SWITCH TO
17 THE LOWER TAR CIGARETTE, THE LIGHT,
18 YOU DIDN'T GET -- ACTUALLY, THE SMOKER
19 DIDN'T GET LESS TAR."
20 SO THAT'S DR. FARONE SAYING THAT.
21 AND LAST, ON THIS PRODUCT HERE,
22 THIS IS THE CAMBRIDGE CIGARETTE, AND THAT'S
23 MEASURING THE BAD STUFF. DR. FARONE SAYS, ON PAGE
24 1574 AND 5, THIS WAS THE FIRST ZERO ZERO TAR
25 CIGARETTE HE HAD SEEN -- EXCUSE ME. IT WAS A
26 PROJECT THAT WAS INTENDED TO MAKE IT AS LOW AS WE
27 POSSIBLY COULD, ZERO, ZERO, OR 0.0. THE CODE NAME
28 FOR THE PROJECT WHICH BECAME CAMBRIDGE WAS TRINITY.

6001

1 SOME OF THE DOCUMENTS YOU HAD DON'T
2 SAY CAMBRIDGE, THEY SAY TRINITY. SO WHEN YOU SEE
3 TRINITY, CAMBRIDGE.
4 THE TAR IS THE BAD STUFF?
5 "NO TAR, NO CARCINOGENS."
6 "NO TAR, NO CARCINOGENS.
7 NOTHING TO ATTACK THE LUNG TISSUES."
8 AND THEN LAST, I MENTIONED THE
9 DEFENDANT IN ONE SITUATION HERE, PHILIP MORRIS HAS
10 A BURDEN OF PROOF. AND THAT COMES ABOUT AS
11 FOLLOWS: WE DON'T HAVE A FINAL PREPARED
12 INSTRUCTION FOR YOU TO PUT UP THERE.
13 BUT IT COMES OUT AS FOLLOWS: UNDER
14 STRICT PRODUCT LIABILITY, I WENT THROUGH THREE
15 DIFFERENT SUBSETS, STRICT PRODUCTS LIABILITY,
16 CONSUMER EXPECTATION TEST, IT DOESN'T WORK THE WAY
17 IT -- IT DOESN'T WORK AS SAFELY AS AN ORDINARY
18 CONSUMER WOULD EXPECT.
19 BUT THE WARNINGS WERE INADEQUATE,
20 AND THAT THE INSTRUCTIONS ON HOW TO SMOKE A LIGHT
21 CIGARETTE WERE INADEQUATE, THAT'S IT, THEY DON'T
22 HAVE THE BURDEN ON THAT.
23 BUT THE THIRD ONE HAD TO DO WITH
24 THE RISKS OF THE PRODUCT OUTWEIGHING THE BENEFITS.
25 THE RISKS, EXCUSE ME, THE RISKS OF THEIR DESIGN OF
26 THE PRODUCT OUTWEIGH THE BENEFIT.
27 AND IN THAT CASE, I WENT THROUGH
28 FIVE, I THINK, FIVE ELEMENTS WITH YOU. AND IF THE

6002

1 JURY FINDS THAT ON THOSE FIVE ELEMENTS, THE
2 PLAINTIFF HAS MET HIS BURDEN OF PROOF. AND IN THAT
3 ONE INSTANT, THE BURDEN THEN SHIFTS TO PHILIP
4 MORRIS.
5 AND IN THAT ONE INSTANT, PHILIP
6 MORRIS THEN HAS TO SHOW YOU THAT THE BENEFITS OF
7 THE PRODUCT OUTWEIGH -- THE BENEFIT OF THE
8 CIGARETTES OUT-WEIGHED THE DANGER INHERENT IN THE
9 DESIGN.
10 SO I COVERED THAT, THEY CAN TALK
11 ABOUT THAT MORE IF THEY WANT.
12 NOW I AM GOING TO TALK DAMAGES AND
13 THERE ARE TWO DIFFERENT, TWO DIFFERENT ISSUES THAT
14 I AM GOING TO DISCUSS. ONE IS TO COMPENSATE MR.
15 BOEKEN. AND IT'S CALLED COMPENSATORY DAMAGES. AND

16 THE SECOND HAS TO DO WITH PUNISHING AND MAKING AN
17 EXAMPLE OF PHILIP MORRIS AND THAT IS CALLED
18 PUNITIVE OR EXEMPLARY DAMAGES.

19 IN THIS PARTICULAR CASE, WE HAD A
20 LOT OF TESTIMONY FROM MR. JOHNSON AND, I THINK,
21 MAYBE MS. MERLO TOO AND SOME OF THE OTHER FROM
22 PHILIP MORRIS ABOUT PHILIP MORRIS'S FINANCIAL
23 CONDITION.

24 THAT ONLY HAS TO DO WITH PUNITIVE
25 OR EXEMPLARY DAMAGES. IT'S GOT NOTHING TO DO WITH
26 COMPENSATORY DAMAGES.

27 AND I THINK I'D JUST LIKE TO MAKE
28 IT CLEAR THAT WHEN WE ARE TALKING ABOUT

6003

1 COMPENSATORY DAMAGES TO COMPENSATE MR. BOEKEN, THE
2 WEALTH OF PHILIP MORRIS IS NOT AN ISSUE. AND THE
3 FACT THAT PHILIP MORRIS IS RICHER THAN MR. BOEKEN
4 IS NOT AN ISSUE. IT'S NOT AN ISSUE.

5 THESE ARE BOTH PEOPLE IN THE EYES
6 OF THE LAW. AND WHEN IT COMES TO COMPENSATION,
7 MR. BOEKEN SHOULD BE COMPENSATED WHETHER IT'S
8 LORILLARD, A LITTLE COMPANY, OR PHILIP MORRIS, A
9 BIG COMPANY. THAT DOESN'T MATTER. COMPENSATION
10 HAS NOTHING DO WITH THE WEALTH OF THE DEFENDANT.

11 HAVING SAID THAT, RICHARD BOEKEN IS
12 SORT OF MY AGE. HE'S SORT OF FROM MY ERA. HE SORT
13 OF WENT THROUGH EXPERIENCES THAT WE HEARD FROM
14 PROFESSOR COBBS HOFFMAN HERE, WENT THROUGH SOME
15 UNIQUE TIMES.

16 I'D LIKE TO TELL YOU MY VIEW OF
17 MR. BOEKEN.

18 WORLD WAR II IS COMING TO AN END
19 END ALMOST EXACTLY AT THE TIME HE WAS BORN.

20 HE GREW UP IN THE POST WORLD WAR II
21 ERA.

22 WHAT OUR COUNTRY AND THE WORLD HAD
23 BEEN THROUGH, THE ENTIRE WORLD AT WAR WAS A HUGE
24 THING. AND THE IMAGE OF THE MILITARY, YOU SAW THIS
25 MARINE POSTER THAT HE LIKED. HE SAID THE MARINES
26 WERE THE ELITE. THAT'S IT. THAT'S WHAT YOUNG KIDS
27 GREW UP WITH.

28 AND THE IDEA OF A TOUGH, RESILIENT,

6004

1 INDEPENDENT, STRONG MALE, I KNOW, NOWADAYS, WE ARE
2 SUPPOSED TO BE MORE SENSITIVE. BUT THE IDEA BACK
3 THEN WAS TOUGH, INDEPENDENT, RESILIENT. AND THAT'S
4 HOW HE SAW HIMSELF. HE WAS A CHILD OF HIS TIMES.

5 AND YOU CAN SEE IT IN HIS ACTIONS.
6 AND YOU CAN SEE IT IN WHAT HE CHOSE TO DO, AND YOU
7 CAN SEE IT IN WHAT HE DID.

8 HE WAS INTO WEIGHT LIFTING. HE WAS
9 INTO PHYSICAL CONDITION.

10 WHEN IT CAME TIME, THERE WAS A WAR
11 GOING ON. HE JOINED THE MILITARY.

12 HIS STEPSON, WHEN HE CAME IN HERE,
13 SAID, YOU KNOW, MY FIRST RECOLLECTION OF THE GUY IS
14 THAT HE BOUGHT ME A BIRD AND A DOG AND WHATEVER,
15 SOMETHING ELSE.

16 BUT BESIDES THAT, HE WAS A BIG,
17 STRONG, TOUGH GUY WHO LIKED TO BE OUTSIDE. HE WAS
18 TANNED. HE WORKED WITH HIS HANDS. HE WAS INTO
19 CONSTRUCTION. WHEN WE DID THINGS IT WAS ALWAYS
20 OUTDOORSY. WHEN WE DID THINGS, IT WAS CAMPING.

21 WHEN WE DID THINGS, IT WAS GOING UP TO THE
22 MOUNTAINS. WHEN WE DID THESE THINGS, IT WAS
23 OUTSIDE, OUT.

24 ANYWAY, NOT ONLY FOR THE PURPOSES
25 OF MY TALKING ABOUT THE LIABILITY ISSUES IN THIS
26 CASE, WAS HE LIKE THE MARLBORO MAN, HE WAS. HE
27 ENJOYED BEING OUTSIDE. HE ENJOYED HIS BODY. HE
28 ENJOYED BEING STRONG. HE ENJOYED THIS MASCULINE

6005

1 THING.

2 MR. BOEKEN NEVER GOT ANY COLLEGE
3 DEGREE. HE NEVER GOT ANY ASSOCIATES DEGREE. AFTER
4 HE GOT OUT OF HIGH SCHOOL, HE STOPPED GOING TO
5 SCHOOL FOR QUITE A WHILE. THEN HE CHECKED BACK IN
6 AND TOOK SOME JUNIOR COLLEGE COURSES. NO DEGREE OF
7 ANY KIND.

8 HE WORKED FOR HANNAH BARBERA AS AN
9 ILLUSTRATOR. HE SAVED A BUNCH OF MONEY AND JOINED
10 THE CROWD IN HIS ERA, AND WHEN HE COULDN'T STAY IN
11 THE NAVY BECAUSE OF A LEG INJURY, HE WENT OUT AND
12 BECAME A HIPPIE FOR A COUPLE YEARS.

13 HE WENT THROUGH THAT PHASE, GOT
14 THROUGH THAT PHASE, GOT THROUGH SOME HARD TIMES,
15 AND SHOWED STRENGTH OF CHARACTER, RESILIENCE,
16 TOUGHNESS, KICKED THIS DRUG, HE KICKED ALCOHOL, AND
17 SOMETHING HE IS IMMENSELY PROUD OF.

18 WHILE HE WAS AT A.A., HE MET JUDY.
19 IT WAS INTERESTING TO HEAR HER TALK FROM A WOMAN'S
20 PERSPECTIVE ABOUT, WELL, WHAT SHE SAW, WHAT SHE
21 LIKED, WHY SHE DECIDED TO HAVE A CHILD WITH HIM.
22 SHE WANTED TO BE SURE THAT THIS WOULD REALLY,
23 REALLY, REALLY, REALLY LAST.

24 BUT TRADITIONAL, GOOD PROVIDER,
25 WORKED HARD, HAD HIS OWN CONSTRUCTION BUSINESS,
26 WENT ON FROM THERE, WORKED FOR HIS FATHER-IN-LAW
27 SELLING WOMEN'S HOSIERY, DIDN'T WORK OUT.
28 GOT INTO THIS BUSINESS LEASING OIL

6006

1 AND GAS STUFF.

2 WE HEARD MORE ABOUT THE BUSINESS, I
3 THINK, FROM HIS BUDDY, ELVIS MENDEZ, THAN WE HEARD
4 FROM HIM. BUT HE'S DONE REALLY WELL AT IT.

5 SO HERE'S A GUY WHO WAS TOUGH,
6 PHYSICALLY, WAS RESILIENT, WAS A HARD WORKER, WAS A
7 GOOD PROVIDER, ALL OF THE THINGS THAT HOPEFULLY WE
8 TELL OUR KIDS THAT THEY SHOULD BE.

9 HIS LIFE EXPECTANCY AS A NORMAL
10 MALE IN OUR SOCIETY IS 21.4 YEARS FROM TODAY.

11 THAT'S, OF COURSE, IF HE DIDN'T
12 HAVE THIS DISEASE.

13 AND, OF COURSE, HE'S NOT THE
14 MAJORITY.

15 BUT THE COMPENSATION IN THIS CASE
16 IS GOING TO HAVE TO COMPENSATE HIM FOR THE LOSS OF
17 21.4 YEARS INTO THE FUTURE AS WELL AS WHAT HE HAS
18 BEEN THROUGH. SO THERE ARE THREE CATEGORIES OF
19 COMPENSATORY DAMAGES. ONE, MEDICAL EXPENSES. YOU
20 ARE GOING TO HAVE THE MEDICAL BILLS. IT'S ABOUT
21 270,000 BUCKS.

22 SECOND, HIS LOSS OF EARNINGS AND
23 EARNING CAPACITY, NOT QUITE AS EASY.

24 YOU ARE GOING TO HAVE MR. BOEKEN'S
25 TAX RETURNS. YOU ARE ALSO GOING TO HAVE MR.

26 BOEKEN'S, A COUPLE DOCUMENTS OUT OF A BANKRUPTCY
27 PETITION.

28 AND IN THAT DOCUMENT FOR THE

6007

1 BANKRUPTCY PETITION, IT STATES WHAT HIS INCOME WAS
2 FOR A COUPLE OF YEARS WHEN WE DON'T HAVE TAX
3 RETURNS FOR.

4 SO IN OTHER WORDS, I DON'T KNOW THE
5 EXACT YEARS BUT YOU LOOK IN THE BANKRUPTCY PAPERS
6 AND IT SAYS FOR YEAR "X," HERE'S WHAT I MADE, YEAR
7 "Y," HERE'S WHAT I MADE. AND THEN AFTER THAT, FOR
8 MOST OF THE YEARS, THERE ARE TAX RETURNS.

9 SO YOU LOOK AT THAT STUFF, AND WE
10 HAD, I HAD MY OWN ACCOUNTANT CAME IN HERE. AND I
11 ALSO HAD ELVIS MENDEZ COME IN HERE. MR. MENDEZ FOR
12 A COUPLE REASONS, BUT RIGHT NOW FOR THE REASON I AM
13 ABOUT TO DESCRIBE.

14 THERE WERE TWO YEARS IN THERE WITH
15 THE TAX RETURNS. YOU WILL JUST SEE THEM. JUST LAY
16 THEM OUT AND THESE TWO STAND OUT LIKE SORE THUMBS.
17 BECAUSE MOST OF THESE TAX RETURNS ARE LIKE 220,000,
18 \$237,000, \$225,000. AND IT'S ALL IN THAT RANGE
19 RIGHT IN THERE.

20 ONE OF THEM, I AM NOT POSITIVE, BUT
21 I THINK IT'S FOR '96 IS \$100,000.

22 SO ELVIS MENDEZ WAS IN HERE. THEY
23 USED TO WORK TOGETHER. THEY STARTED OUT AT TEASE
24 SAME COMPANIES WHEN THEY GOT INTO THIS OIL AND GAS
25 LEASING AND OIL AND GAS WELL INVESTMENT. AND THEY
26 BOTH WENT OUT ON THEIR OWN AND THEY BOTH STARTED
27 THEIR OWN COMPANIES AND THEY ARE BUDDIES.

28 THEY TRIED, YOU KNOW, THEY HAVE

6008

1 GONE AS FAR AS TO GO TOGETHER TO LOOK AT OFFICE
2 SPACE TOGETHER BECAUSE THEY ARE THINKING ABOUT IF
3 NOT PARTNERING UP, AT LEAST SHARE SPACE. AND
4 ALTHOUGH THEY WALKED RIGHT UP TO THE EDGE SEVERAL
5 TIMES, LIKE UP TO THE ALTER, THEY DIDN'T DO THAT.
6 IT JUST DIDN'T HAPPEN.

7 BUT THEY ARE IN THE SAME BUSINESS.
8 THEY FLY DOWN TO TEXAS TOGETHER TO LOOK AT THESE
9 WELLS. THEY GO TO VEGAS TOGETHER TO GO TO COMPUTER
10 SHOWS AND STUFF LIKE THAT.

11 ELVIS MENDEZ SAID THAT THEY BOTH
12 GOT INTO A DEAL AND THEY PUT THEIR INVESTORS INTO A
13 DEAL IN ORDER TO INVEST IN A.T.M. MACHINES. AND
14 THE DEAL WENT SOUTH. IT DIDN'T WORK OUT. THERE
15 WAS A LOT OF MONEY LOST.

16 NOW, THESE INVESTORS HAVE TO BE
17 KEPT HAPPY.

18 AND SO BOTH ELVIS MENDEZ AND
19 RICHARD BOEKEN DECIDED THEY WOULD MAKE THE
20 INVESTORS HAPPY BY EATING THESE LOSSES.

21 AND ELVIS MENDEZ SAID, AND I AM NOT
22 POSITIVE NOW, BUT THERE'S A TRANSCRIPT IF YOU WANT,
23 BUT HE THINKS IT WAS AROUND '96.

24 I AM JUST SIMPLY TELLING YOU THAT
25 IF MR. BOEKEN LOST MONEY ON A.T.M.'S AND HE DECIDED
26 TO EAT THE LOSSES, FINE, THAT'S GOOD. I AM NOT
27 ASKING FOR ANY COMPENSATION FOR THAT.

28 I AM SIMPLY EXPLAINING WHY THAT ONE

6009

1 YEAR WAS A DOWN YEAR.

2 SO ONE OF THOSE TWO YEARS THAT
3 STOOD OUT, INVESTED IN A.T.M.'S, TURNED OUT TO BE
4 BAD. THEY DIDN'T WANT THEIR INVESTORS TO EAT IT.
5 SO THEY AGREED TO EAT IT THEMSELVES.
6 AND THEN THE SECOND YEAR WAS 1998.
7 AND IN THAT YEAR, THERE WAS A TAX
8 RETURN FOR, YOU KNOW, IT'S -- YOU WILL SEE IT, IT'S
9 LIKE 70,000 OR 37,000. BUT IT'S WAY ABOVE. AND IT
10 DIDN'T LOOK RIGHT TO ME. AND THAT'S WHEN I ASKED
11 BURNEY LEWAK, THE EVIDENCE IS HERE THAT HE'S MY
12 PERSONAL ACCOUNTANT. HE DID A FAVOR, TAX SEASON,
13 TO GO THROUGH ALL THIS STUFF AND FIND OUT WHAT'S
14 WHAT.

15 AND HE WENT THROUGH ALL THE BOXES
16 AND HE DID ALL THE STUFF AND HE CAME IN HERE AND HE
17 TOLD YOU WHAT HE THOUGHT THE INCOME, THE REAL TRUE
18 INCOME WAS AND THAT IT WAS GOING TO BE FILING AN
19 AMENDED HAD RETURN AND IT WAS, IT WAS LIKE
20 \$170,000.

21 WHAT YOU WANT TO DO WITH THIS SET
22 OF FACTS, I AM NOT QUITE SURE.

23 WHEN DOCTOR FORMUSIS, HE'S THE
24 ECONOMIST, CAME IN HERE TO GIVE A BOTTOM LINE
25 NUMBER, HE TOOK ALL OF THE FIGURES RIGHT OFF OF THE
26 PAPERS, ALL THE TAX RETURNS, THE YEAR HE MADE
27 100,000, THAT'S WHAT HE MADE.

28 AND ALL THE OTHER YEARS HE TOOK

6010

1 THEM RIGHT OFF THE TAX RETURNS EXCEPT FOR ONE YEAR
2 AND THE ONE YEAR HE DIDN'T TAKE IT OFF THE TAX
3 RETURN WAS THE YEAR THAT BURNEY LEWAK TALKED ABOUT.

4 TO ME, IT'S NOT A MAJOR ISSUE IF
5 MR. BOEKEN'S COMPENSATION FOR THAT YEAR IS 173 OR
6 IS 73 OR WHATEVER. IN THE CONTEXT OF WHAT THIS
7 CASE IS, AND WHAT MR. BOEKEN'S DAMAGES IS AND WHAT
8 I AM ABOUT TO TALK ABOUT, IT'S NOT A HUGE ISSUE.

9 BUT I HAVE TAKEN THIS TIME TO
10 EXPLAIN THE FLOW OF THE INCOME THROUGH THE
11 WITNESSES AND HOW IT WORKED.

12 HE WAS A SUCCESSFUL BUSINESS MAN.

13 AND YOU KNOW, WE FOLLOWED, THROUGH
14 HIS TESTIMONY, THROUGH HIS WIFE'S TESTIMONY AND
15 SOME TESTIMONY, THAT LIVING IN AN APARTMENT IN
16 SANTA MONICA, AND GOING FROM THERE TO PACIFIC
17 PALISADES AND GOING FROM THERE TO TOPANGA AND SHE
18 SAID HIS LOVE WAS BUSINESS.

19 THAT'S ONE OF THE THINGS THAT
20 ATTRACTED HER TO HIM. I GUESS NOT SURPRISING. HER
21 DAD WAS A BUSINESS MAN. AND THAT'S WHERE SHE --
22 SHE GREW UP IN THAT KIND OF ENVIRONMENT.

23 SHE LOVED HEARING POWERFUL RICHARD
24 DO BUSINESS ON THE PHONE.

25 ANYWAY, THE GUY WAS NOT BORN WITH A
26 SILVER SPOON IN HIS MOUTH. HE WORKED HARD, AND HE
27 WAS SUCCESSFUL. AND HE WAS MAKING DARN GOOD MONEY.
28 LIKE HE WILL NEVER MAKE ANY MORE.

6011

1 AND THE LOSS OF EARNINGS PAST, AND
2 EARNING CAPACITY THAT DR. FORMUZIS TOLD YOU ABOUT
3 IS SOMEPLACE IN THE VICINITY OF 2.1 MILLION
4 DOLLARS.

5 PAST IS LIKE \$450,000 IN ROUND
6 NUMBERS. AND THE FUTURE, IT'S SOMETHING LIKE 1.7

7 MILLION DOLLARS.
8 THIS ASSUMES HE WOULD HAVE STOPPED
9 WORKING WHEN HE WAS, I THINK, 66 AND A HALF YEARS
10 OLD. SO YOU WANT TO PUT 66, 67.
11 BUT HE DIDN'T WANT TO QUIT TOTALLY,
12 BUT THAT'S WHERE WE STOPPED.
13 AND THAT'S WHERE THE NUMBER COMES
14 FROM.
15 SO TO COMPENSATE MR. BOEKEN,
16 MEDICAL EXPENSES, LOSS OF EARNINGS, LOSS OF EARNING
17 CAPACITY IN THE FUTURE.
18 IT WAS BROUGHT OUT HERE THAT THE
19 OIL AND GAS BUSINESS IS A RISKY BUSINESS, OKAY.
20 AND IT WAS ALSO BROUGHT OUT HERE,
21 AND I DON'T WANT TO MAKE ANYONE UNHAPPY WITH
22 RICHARD BOEKEN OR ELVIS MENDEZ, BUT THE ENERGY
23 BUSINESS IS NOT A VERY BAD BUSINESS TO BE IN
24 NOWADAYS, UNFORTUNATELY FOR US CONSUMERS.
25 BUT THERE IS A LINE OF EARNINGS
26 FROM WHEN HE STARTED OUT AND HIS INCOME STARTS AT
27 AROUND \$75,000, AND IT JUST GOES STRAIGHT UP.
28 EXCEPT FOR THOSE TWO LITTLE PROBLEMS THAT I JUST
6012
1 MENTIONED.
2 SO HE SHOULD BE COMPENSATED FOR HIS
3 LOSS OF EARNINGS.
4 AND THEN THERE'S SOMETHING CALLED
5 GENERAL DAMAGES.
6 THERE IS A JURY INSTRUCTION ON
7 THAT, PAIN, SUFFERING, FEAR, ANXIETY, ALL THESE
8 WORDS, AND I AM NOT GOING TO GO THROUGH THEM.
9 HIS DEMEANOR AND HIS FACIAL
10 EXPRESSIONS AND HIS SIZE, AND RECOUNTING WHAT
11 HAPPENED THROUGH HIS DIAGNOSIS, AND WAITING FOR THE
12 RESULTS OF THE PATHOLOGY TEST, AND WHAT HAPPENED TO
13 HIM ALONG THE LINE, I KNOW YOU HEARD THAT A MONTH
14 AGO, IT'S THERE IF YOU WANT TO HEAR IT AGAIN. BUT
15 IT SPEAKS MORE ELOQUENTLY AND MORE GENUINELY THAN I
16 EVER COULD. AND I HAVE BEEN DOING THIS A LONG
17 TIME, WAY BETTER.
18 HE TAKES HIS SON TO THE DOCTOR.
19 WHILE HE IS THERE, HE HAS BRONCHITIS. THIS IS NOT
20 HIS DOCTOR. HE SAYS, HEY, WHAT ABOUT THIS COUGH?
21 THE DOCTOR SAYS, AS LONG AS YOU ARE
22 HERE, LET'S TAKE AN X-RAY, UH-OO, SOMETHING I DON'T
23 LIKE. LET'S GO GET AN M.R.I., UH-OO, SOMETHING I
24 REALLY DON'T LIKE. I WANT YOU TO GO SEE A
25 SPECIALIST.
26 AND SO HE HAS A BIOPSY AND HE IS
27 LYING THERE ON THIS TABLE, HE IS HAVING A BIOPSY,
28 AND THERE'S THIS FROZEN SECTION, AND IT'S POSITIVE,
6013
1 AND THERE GOES PART OF HIS LUNG.
2 AND HE IS TOLD, YOU KNOW WHAT, YOUR
3 ODDS ARE "X," AND I FORGOT WHAT HE SAID, IT WAS
4 SOMETHING LIKE 70 PERCENT, SOMETHING LIKE THAT, NO
5 RETURN, IF IT HASN'T SPREAD TO YOUR LYMPH NODES.
6 SO LET'S WAIT.
7 SO, YOU KNOW, IT'S THE WORST THING.
8 IT'S, I GUESS, THE THING THAT IS TERRIBLE.
9 SOME OF US HAVE THOUGHT ABOUT IT.
10 SOME OF US HAVE HAD TO THINK ABOUT IT. SOME OF US
11 HAVE NEVER THOUGHT ABOUT IT. BUT HE HAS TO NOW

12 WAIT TO HEAR WHAT SOME DOCTOR FINDS ON A SLIDE,
13 UNDER A MICROSCOPE, IN SOME WINDOWLESS ROOM ACROSS
14 TOWN THAT'S GOING TO DECIDE HIS FATE.

15 AND WHO KNOWS WHAT KIND OF
16 EMOTIONAL AND MENTAL DEFENSES ARE PUT ON DURING
17 THAT TIME. BUT THE COIN WAS FLIPPED AND IT CAME
18 DOWN THE WRONG WAY.

19 AND WE KNOW FROM THE TESTIMONY IN
20 THIS CASE, THAT COIN ALMOST ALWAYS COMES DOWN THE
21 WRONG WAY. IT IS A FATAL DISEASE.

22 BUT HE DIDN'T KNOW. SO HE HOPED
23 AND HE HOPED AND HE HOPED. AND HE WAS GIVEN THE
24 NEWS THAT HIS LYMPH NODES WERE INVOLVED. AND NOW
25 HIS ODDS WERE DOWN TO, AGAIN, I CAN'T QUOTE
26 EXACTLY, BUT I THINK IT'S LIKE 20 TO 30 PERCENT IS
27 WHAT HE SAID.

28 CHEMOTHERAPY HAD TO BE CUT SHORT.

6014

1 THE LAST DOSE HE COULDN'T TAKE.
2 HE HAD ALL THESE UNBELIEVABLE SIDE
3 EFFECTS.

4 DR. SARNA CAME IN HERE AND SAID,
5 YEAH, THAT'S WHAT CHEMOTHERAPY IS ALL ABOUT. YOU
6 SIT SOMEONE DOWN AND HOOK THEM UP TO A BOTTLE AND
7 STICK IT IN YOUR ARM AND WE FEED THEM POISON FOR
8 SIX HOURS. AND THAT POISON KILLS HIS CANCER CELLS,
9 HOPEFULLY. BUT IT DOESN'T HELP THE REST OF YOU ALL
10 THAT MUCH, EITHER.

11 SO HE HAD FIVE OF THOSE. AND HE
12 HAD SOME RADIATION THERAPY.

13 AND WE HEARD FROM HIM, WE HEARD
14 FROM HIS WIFE. WE HEARD A LITTLE BIT FROM THE
15 STEPSON.

16 WE HEARD FROM DR. SARNA ABOUT SOME
17 OF THOSE SIDE EFFECTS.

18 AND HE STOPPED SMOKING. HE STOPPED
19 SMOKING (INDICATING).

20 AND THEN IN AUGUST OF 2000, HE
21 FOUND OUT THAT HE HAD A METASTASIS TO HIS LOW BACK.

22 AND MORE TREATMENT, DEBILITATING
23 TREATMENT.

24 HE IS TRYING TO KEEP HIS BUSINESS
25 TOGETHER. HE IS TRYING TO KEEP HIS LIFE TOGETHER.
26 HE IS TRYING TO PUT ON A BRAVE FRONT FOR HIS KID.
27 HE WAS NEVER BEDRIDDEN, EVEN THOUGH THEY TOOK OUT
28 PART OF HIS LUNG, HE WAS NEVER BEDRIDDEN. HE WAS

6015

1 IN A CHAIR, BECAUSE HE WANTED TO BE TOUGH FOR HIS
2 KID.

3 HE STARTED SNEAKING CIGARETTES FROM
4 HIS WIFE. IT HAS METASTASIZED TO HIS LOW BACK.

5 WHO KNOWS WHAT KIND OF STORIES
6 PEOPLE TELL THEMSELVES ABOUT THEIR LIVES. BUT WHEN
7 HE REPORTED TO THE DOCTOR, I HAVE THESE SIDE
8 EFFECTS, AND THIS IS AROUND CHRISTMASTIME OF 2000,
9 THIS IS JUST BEFORE THOSE DEPOSITIONS WERE TAKEN,
10 DOCTOR, I AM HAVING SIDE EFFECTS FROM THIS
11 TREATMENT, VISION PROBLEMS, BALANCE PROBLEMS,
12 BUMPING INTO STUFF, THE DOCTOR THOUGHT, THAT'S WHAT
13 YOU THINK, PROBLEMS FROM THE TREATMENT, AND ORDERED
14 AN M.R.I. WHICH YOU HAVE SEEN HERE.

15 AND ALL THOSE PROBLEMS WERE CAUSED
16 BY BRAIN CANCER.

17 AND WHEN MR. BOEKEN HEARD THAT, OF
18 COURSE, HE WAS CRUSHED.
19 AND IF THERE WAS EVER ANY DOUBT
20 ABOUT WHO WAS ADDICTED TO WHAT, HE WALKED OUT OF
21 THAT PLACE AND WENT BANANAS BECAUSE IT DOESN'T
22 MATTER ANY MORE.
23 ANYWAY, FOR WHAT HE HAS BEEN
24 THROUGH SINCE OCTOBER OF 1999, AND FOR WHAT HE IS
25 GOING THROUGH NOW, HE CAN'T EVEN ATTEND HIS OWN
26 TRIAL. AND FOR WHAT HE IS GOING TO GO THROUGH FOR
27 HOWEVER LONG HE IS, BEFORE THE FATAL DISEASE SLAYS
28 HIM, AND FOR THE LAST OF 20 YEARS 21.4 YEARS IN THE

6016

1 FUTURE, 21.4 YEARS FROM NOW, 2001, 2022, IT'S LIKE
2 AROUND 2022, '23, THAT'S A LONG, LONG, LONG TIME
3 THAT HE IS NOT GOING TO HAVE, WITH HIS WIFE, WITH
4 HIS KID. THINGS CHANGE SO FAST IT IS ALMOST
5 IMPOSSIBLE FOR ME TO TELL YOU HOW LONG THAT IS.
6 BUT I HAVE A BETTER SHOT AT IT BY
7 FLIPPING IT TO SHOW YOU HOW LONG 22 YEARS IS.
8 HE WAS DIAGNOSED AT THE END OF
9 1999, LET'S GO BACK TO THE 1980'S, 1977 AND A HALF.
10 NO ONE HAD ANY CELL PHONES. NO ONE
11 HAD ANY COMPUTER. NO ONE HAD A FAX. THESE THINGS
12 DIDN'T EXIST.
13 JIMMY CARTER WAS THE PRESIDENT OF
14 THE UNITED STATES. VIETNAM WAR HAD ENDED FOR TWO
15 YEARS.
16 DR. FARONE WAS IN HIS FIRST YEAR OF
17 PHILIP MORRIS.
18 THAT'S A LONG TIME, LONG, LONG,
19 LONG TIME.
20 ANYWAY, YOUR COMPENSATION FOR
21 GENERAL DAMAGES HAS TO COVER SINCE OCTOBER OF 1999
22 AND FOR HIS LOSS OF ALL OF THE FUTURE TIME AND HIS
23 LIFE EXPECTANCY.
24 REMEMBER THAT, BECAUSE, THERE'S A
25 LOT OF HUMAN LIFE THAT'S BEEN DISCUSSED IN THIS
26 CASE. THAT'S AROUND TEN MILLION DOLLARS, AROUND
27 TEN MILLION. I SAT DOWN, AND I AM PRETTY GOOD AT
28 MATH, AND I SAT DOWN AND TRIED TO FIGURE IT OUT,

6017

1 HOW MUCH HERE, WHAT THERE, WHAT THERE, AND I THREW
2 IN THE TOIL TOWEL, THAT'S MY SUGGESTION.
3 AND I THOUGHT ABOUT SUGGESTING A
4 HIGHER NUMBER. I SAID, WELL, I DON'T WANT THEM TO
5 THINK I AM GREEDY. I THOUGHT ABOUT SUGGESTING A
6 LOWER NUMBER. I DON'T WANT TO STIFF MY CLIENT.
7 THERE'S NOTHING MAGIC ABOUT THAT.
8 BUT THAT'S THE NUMBER.
9 SO THAT'S COMPENSATORY DAMAGES.
10 NOW, HERE'S A SWITCH, AND I WANT TO
11 TALK ABOUT WHAT'S CALLED PUNITIVE OR EXEMPLARY
12 DAMAGES.
13 THIS IS NOT TO COMPENSATE
14 MR. BOEKEN. I AM NOT TALKING ABOUT MR. BOEKEN ANY
15 MORE.
16 I AM TALKING ABOUT PHILIP MORRIS.
17 BUT I'D LIKE TO, I SAID THIS IN MY
18 OPENING STATEMENT SO I WOULD JUST LIKE TO REPEAT
19 IT.
20 PHILIP MORRIS ON TRIAL, RICHARD
21 BOEKEN'S ON TRIAL?

22 I PUT PHILIP MORRIS ON TRIAL.
23 PHILIP MORRIS PUTS RICHARD BOEKEN ON TRIAL.
24 RICHARD BOEKEN'S SIN WAS THAT HE
25 BELIEVED PHILIP MORRIS. THAT IS HIS SIN. HE
26 BELIEVED THEM.
27 AND I AM GOING TO TALK ABOUT THAT.
28 IN FACT, I AM GOING TO LET SOMEONE
6018
1 ELSE TALK ABOUT THEM, THE PEOPLE THAT WROTE THESE
2 JURY INSTRUCTIONS SAY.
3 "IF YOU FIND THAT THE
4 PLAINTIFF SUFFERED ACTUAL INJURY, OR
5 HARM OR DAMAGE CAUSED BY DEFENDANT,
6 YOU MAY THEN CONSIDER WHETHER YOU
7 SHOULD AWARD PUNITIVE DAMAGES AGAINST
8 DEFENDANT FOR THE SAKE OF EXAMPLE OR
9 BY WAY OF PUNISHMENT."
10 LET ME STOP THERE FOR A SECOND. I
11 CALL THESE PUNITIVE AND EXEMPLARY, THIS SAYS
12 EXAMPLE AND PUNISHMENT.
13 BUT YOU GET THE DRIFT. IT'S TO
14 PUNISH, BUT IT'S ALSO MAKING AN EXAMPLE OF. SO
15 PEOPLE COMING DOWN THE LINE, LATER ON, IF THEY ARE
16 INCLINED TO TAKE THE SAME COURSE, TO HAVE A LITTLE
17 GUIDELINE TO WHAT AWAITS THEM, WHOEVER DECIDES TO
18 PULL THIS KIND OF STUNT A AGAIN, THEY WILL KNOW
19 WHAT AWAITS THEM.
20 "YOU MAY, IN YOUR
21 DISCRETION --"
22 AND I WANT TO STOP AGAIN,
23 "DISCRETION" MEANS THAT. YOU MAY FIND, YOU MAY
24 FIND PHILIP MORRIS IS THE MOST DESPICABLE
25 ORGANIZATION ON THE FACE OF THE EARTH BUT YOU MAY
26 DECIDE, IN YOUR DISCRETION, TO DO NOTHING ABOUT IT.
27 THAT IS YOUR CHOICE. THAT'S YOUR CHOICE.
28 "YOU MAY, IN YOUR
6019
1 DISCRETION, AWARD SUCH DAMAGES IF, BUT
2 ONLY IF, YOU FIND BY CLEAR AND
3 CONVINCING EVIDENCE THAT DEFENDANT WAS
4 GUILTY OF OPPRESSION, FRAUD OR MALICE
5 IN THE CONDUCT ON WHICH YOU BASE YOUR
6 FINDING OF LIABILITY."
7 SO BEFORE I TALKED ABOUT BURDEN OF
8 PROOF IN THIS CASE, RIGHT HERE, PUNITIVE DAMAGES,
9 RICHARD BOEKEN, THROUGH ME, HAS A DIFFERENT BURDEN
10 OF PROOF.
11 FOR COMPENSATION, FOR EVERYTHING WE
12 HAVE TALKED ABOUT SO FAR, PREPONDERANCE OF THE
13 EVIDENCE. 51, 49.
14 NO ONE'S LIFE IS BEING TAKEN. NO
15 ONE'S LIBERTY IS BEING TAKEN.
16 PUNITIVE DAMAGES ARE SOMEPLACE THIS
17 SIDE OF BEYOND A REASONABLE DOUBT.
18 NOW WE ARE NOT COMPENSATING, THIS
19 IS PUNISHMENT.
20 AND IT'S FAIR. IT'S FAIR THAT THE
21 BURDEN OF PROOF BE STRONGER.
22 BECAUSE NOW IT'S NOT JUST
23 COMPENSATION, IT'S PUNISHMENT. SO IT'S FAIR THAT
24 RICHARD BOEKEN, THREW ME, HAS TO PROVE STRONGER
25 THAT THEY DESERVE TO BE PUNISHED.
26 AND THE WAY I VISUALIZE IT IS LIKE

27 THIS, AND THIS IS JUST ME, IF THIS IS WHERE WE
28 START, EVEN, DEAD EVEN, 50-50, AND WE GOT TO GO TO 6020

1 THIS TO TAKE SOMEONE'S LIFE AND LIBERTY, 99 TO 1,
2 MY SHORTHAND, AND WE GOT TO GO THIS (INDICATING)
3 FOR COMPENSATION 51, 49, SOMEPLACE IN THE MIDDLE
4 THERE IS CLEAR AND CONVINCING EVIDENCE.
5 AND I DON'T KNOW IF THERE'S A
6 NUMBER FOR IT.
7 I KNOW THERE'S A 51, 49. BUT AFTER
8 THAT, I DON'T KNOW.
9 BUT CLEAR AND CONVINCING EVIDENCE
10 IS BETWEEN THESE TWO EXTREMES.
11 SO THE BURDEN HERE IS BY CLEAR AND
12 CONVINCING EVIDENCE.
13 THE PEOPLE WHO WRITE THESE LAWS TO
14 BE WRITTEN, TO BE GIVEN TO THE JURY, HERE'S WHAT
15 THEY SAY.
16 "CLEAR AND CONVINCING
17 EVIDENCE MEANS EVIDENCE OF SUCH
18 CONVINCING FORCE THAT IT DEMONSTRATES,
19 IN CONTRAST TO OPPOSING EVIDENCE, A
20 HIGH PROBABILITY OF TRUTH OF THE FACTS
21 FOR WHICH IT IS OFFERED AS PROOF.
22 SUCH EVIDENCE REQUIRES A HIGHER
23 STANDARD OF PROOF THAN PROOF BY
24 PREPONDERANCE OF THE EVIDENCE. YOU
25 SHOULD CONSIDER ALL OF THE EVIDENCE
26 BEARING UPON EVERY ISSUE REGARDLESS OF
27 WHO PRODUCED IT."
28 SO THIS REQUIRES MORE PROOF THAN 6021

1 51/49. IT DOESN'T DEFINE IT FURTHER. BUT IT'S GOT
2 TO BE A HIGH FRONT, NOT LIKE PUTTING SOMEONE IN
3 PRISON, NOT BEYOND A REASONABLE DOUBT, BUT A HIGH
4 PROBABILITY.
5 AND I ACCEPT THAT BURDEN, EAGERLY.
6 SO FOR A HIGH PROBABILITY OF TRUTH,
7 HERE'S WHAT HAS TO BE SEEN, SHOWN. THAT PHILIP
8 MORRIS WAS GUILTY OF OPPRESSION, FRAUD OR MALICE.
9 "MALICE MEANS CONDUCT WHICH
10 IS INTENDED BY THE DEFENDANT TO CAUSE
11 INJURY TO PLAINTIFF, WHICH WE DON'T
12 CLAIM, OR, THIS, WE DO CLAIM,
13 DESPICABLE CONDUCT WHICH IS CARRIED ON
14 BY THE DEFENDANT WITH A WILLFUL AND
15 CONSCIOUS DISREGARD FOR THE RIGHTS AND
16 SAFETY OF OTHERS."
17 SO THE WORDS THERE ARE WILLFUL AND
18 CONSCIOUS DISREGARD FOR THE RIGHTS AND SAFETY OF
19 OTHERS.
20 READ THE DOCUMENTS.
21 "A PERSON ACTS WITH
22 CONSCIOUS DISREGARD OF THE RIGHTS OR
23 SAFETY OF OTHERS WHEN HE OR SHE IS
24 AWARE OF THE PROBABLE DANGEROUS
25 CONSEQUENCES OF HIS OR HER CONDUCT AND
26 WILLFULLY AND DELIBERATELY FAILS TO
27 AVOID THOSE CONSEQUENCES."
28 READ THE DOCUMENTS, PLEASE. 6022

1 AWARE, AWARE, AWARE. DO NOTHING,
2 DO NOTHING, DO NOTHING. COVER UP, COVER UP, COVER

3 UP. MISINFORMATION, DISINFORMATION,
4 COUNTER-INFORMATION.
5 LET THE LAWYERS RUN THE SHOW.
6 SELECT OUR PROGRAMS FOR LITIGATION PURPOSES.
7 SELECT OUR PROGRAMS FOR PUBLIC RELATIONS PURPOSES.
8 SELECT OUR PROGRAMS FOR ANY PURPOSES OTHER THAN
9 SAFETY AND SCIENCE. SCIENTIFIC RESEARCH ABDICATED
10 TO THE LAWYERS. NO INVOLVEMENT ON THE PART OF
11 SCIENCE OR BUSINESS. LORILLARD'S MANAGEMENT IS
12 OPPOSED TO TOTAL MANAGEMENT BEING IN THE HANDS OF
13 COMMITTEE LAWYERS. IT'S REMINISCENT OF THE LATE
14 '60'S.
15 WE ARE DIGGING OUR OWN GRAVE IF WE
16 DO SCIENTIFIC RESEARCH.
17 AND YOU KNOW WHAT, THERE'S A BUNCH
18 OF SMALL ONE'S. YOU HAVE HEARD IT ENOUGH, SEEN IT
19 ENOUGH. YOU ARE GOING TO HAVE IT ENOUGH.
20 PHILIP MORRIS DID NOT LIKE
21 BIOMEDICAL RESEARCH.
22 PHILIP MORRIS DIDN'T DO BIOMEDICAL
23 RESEARCH.
24 PHILIP MORRIS NEVER TESTED ITS
25 MARLBORO CIGARETTE UNTIL THE YEAR LATE 2000.
26 PHILIP MORRIS REPEATEDLY LIED TO
27 ITS CUSTOMERS, POPULATION, THE CONGRESS, PHILIP
28 MORRIS DISRESPECTED EVERYTHING THERE WAS EXCEPT FOR
6023
1 ONE THING, WHICH IS THE BOTTOM LINE.
2 AND WHEN THE CHOICE CAME BETWEEN
3 MONEY AND HEALTH, IT WAS MONEY. AND WHEN THE
4 CHOICE CAME BETWEEN MONEY AND DEATH, IT WAS MONEY.
5 AND WHEN THE CHOICE CAME BETWEEN
6 MONEY AND SAFETY, IT WAS MONEY. AND WHEN THE
7 CHOICE CAME BETWEEN MONEY AND THE RIGHTS OF OTHERS,
8 IT WAS MONEY.
9 AND WHEN THE CHOICE CAME BETWEEN
10 ANYTHING IN THE WORLD AND MONEY, IT WAS MONEY.
11 AND IF YOU DON'T THINK I AM RIGHT,
12 I AM GOING TO QUOTE MR. BIBLE IN JUST A BIT.
13 THAT'S OPPRESSION, THAT'S MALICE.
14 SO WE HAVE TO SHOW EITHER MALICE OR
15 OPPRESSION.
16 OPPRESSION IS DESPICABLE CONDUCT
17 THAT SUBJECTS A PERSON TO CRUEL AND UNUSUAL --
18 UNJUST HARDSHIP IN CONSCIOUS DISREGARD OF THAT
19 PERSON'S RIGHTS.
20 "DESPICABLE CONDUCT IS
21 CONDUCT WHICH IS SO -- PICK ONE, ANY
22 ONE GETS YOU WHERE WE ARE GOING. BUT
23 IN THIS PARTICULAR CASE. THEY ALL
24 FIT, "VILE, BASE, CONTEMPTIBLE,
25 MISERABLE, WRETCHED OR LOATHSOME THAT
26 IT WOULD BE LOOKED DOWN UPON AND
27 DESPISED BY ORDINARY, DECENT PEOPLE."
28 ONE OF THE REMARKABLE THINGS THAT
6024
1 WE HAVE HEARD HERE FROM MS. MERLO, ONE OF THE NINE
2 SENIOR MANAGEMENT TEAM PEOPLE AT PHILIP MORRIS
3 U.S.A. TOBACCO, IS THAT WHEN THEY DO ALL OF THEIR
4 FOCUSING AND POLLING AND RESEARCHING AND TEST
5 MARKETING, THE PEOPLE COME BACK AND SAY, WE THINK
6 YOUR COMPANY, DO YOU WANT TO HEAR ABOUT LOOKED DOWN
7 UPON AND DESPISED? WE THINK YOUR COMPANY IS THE

8 DEVIL LIVE ON EARTH. OR, PUNITIVE DAMAGE IF MALICE
9 IS SHOWN OR OPPRESSION IS SHOWN OR FRAUD.
10 "FRAUD MEANS AN INTENTIONAL
11 MISREPRESENTATION, DECEIT OR
12 CONCEALMENT OF A MATERIAL," MATERIAL
13 MEANING FOR "FACT KNOWN TO PHILIP
14 MORRIS WITH THE INTENTION ON THE PART
15 OF PHILIP MORRIS OF THEREBY CAUSING
16 INJURY. THE LAW PROVIDES NO FIXED HAD
17 STANDARDS -- " INJURY MEANING DAMAGE.
18 "THE LAW PROVIDES NO FIXED STANDARDS
19 AS TO THE AMOUNT OF SUCH PUNITIVE
20 DAMAGES, BUT LEAVES THE AMOUNT TO THE
21 JURY'S SOUND DISCRETION, EXERCISED
22 WITHOUT PASSION OR PREJUDICE."
23 YESTERDAY I FLASHED ABOUT FIVE OR
24 SIX OF THESE FRAUD JURY INSTRUCTIONS UP ON THE
25 ELMO. I DID IT QUICKLY. PLEASE TAKE A LOOK AT
26 THEM. IT'S COMMON SENSE. WHERE FRAUD, DIFFERENT
27 KINDS OF FRAUD, BASICALLY IS SAYING ONE THING AND
28 YOU KNOW IT'S NOT TRUE, YOU ARE SAYING ONE THING

6025

1 WHEN YOU GOT NO REASON TO SAY IT, BECAUSE YOU
2 SUSPECT IT'S NOT TRUE, OR SAYING SOMETHING TO LURE
3 SOMEONE IN. THE FRAUD IS BASICALLY CREATING DOUBT
4 ABOUT THE HEALTH CHARGE WITHOUT ACTUALLY DENYING
5 IT.
6 THAT'S ALL OF THESE KINDS OF FRAUD
7 IN A NUTSHELL.
8 IN ARRIVING AT ANY AWARD FOR
9 PUNITIVE DAMAGES, YOU ARE TO CONSIDER THE FOLLOWING
10 THREE THINGS: "ONE, THE REPREHENSIBILITY OF THE
11 CONDUCT."
12 IN OTHER WORDS, ARE WE DEALING HERE
13 WITH PURSE SNATCHERS OR ARE WE DEALING HERE WITH
14 ROBBERS, OR ARE WE DEALING HERE WITH BURGLARRERS,
15 OR ARE WE DEALING HERE WITH WHAT?
16 AND SO I AM SAYING TO THE JURY THAT
17 600,000 PEOPLE IN THE LAST HUNDRED YEARS HAVE DIED
18 IN AMERICAN WARS, 600,000 AMERICANS, AND I AM
19 SAYING TO THE JURY THAT SINCE 1965, OR IN ROUND
20 NUMBERS, 17 MILLION PEOPLE HAVE DIED PREMATURELY
21 FROM TOBACCO IN THIS COUNTRY.
22 AND I AM SAYING TO THIS JURY THAT I
23 CAN'T EVEN BEGIN, THIS IS SO FAR OFF OF THE SCALE,
24 THAT I CAN'T REALLY TRUST THIS. I CAN'T BEGIN TO
25 DESCRIBE IT.
26 THIS WAS ALL DONE FOR MONEY.
27 THIS IS THE 1994 DEAR SHAREHOLDER
28 LETTER FROM MR. BIBLE.

6026

1 SECOND THING YOU HAVE GOT TO
2 CONSIDER, THE AMOUNT OF PUNITIVE DAMAGES WHICH WILL
3 HAVE A DETERRENT EFFECT ON THE DEFENDANT IN LIGHT
4 OF ITS FINANCIAL CONDITION.
5 AND THIS IS WHY, IN THIS PARTICULAR
6 CASE, I CAUTIONED YOU EARLIER, PHILIP MORRIS'S
7 WEALTH IS REALLY NOT TO BE CONSIDERED WHEN YOU
8 THINK ABOUT COMPENSATING MR. BOEKEN.
9 BUT IN THIS CASE, THAT IS PUT
10 BEFORE THE JURY, BECAUSE IT'S SOMETHING THAT MUST
11 BE CONSIDERED HERE. HOW MUCH PUNISHMENT WILL IT
12 TAKE TO HAVE A DETERRENT EFFECT IN LIGHT OF THE

13 DEFENDANT'S FINANCIAL CONDITION?
14 IF I WAS GOING TO PUNISH OR MAKE AN
15 EXAMPLE OF ONE OF MY KIDS, WHO MAKES A HECK OF A
16 LOT LESS MONEY THAN I DO, THEN THE FINE THAT WOULD
17 BE IMPOSED ON ONE OF MY KIDS WOULD BE A HECK OF A
18 LOT LESS THAN IF I IMPOSED ON ME TO PREVENT, TO
19 DETER FUTURE CONDUCT.
20 THIS IS WHAT MR. JOHNSON TOLD US.
21 THIS IS REVENUES.
22 THIS GOES FROM '98 TO 2000.
23 AND WHILE I -- JUST SO I DON'T
24 FORGET IT, HE WAS ASKED BY MR. CARLTON, WELL, WHEN
25 YOU ARE TELLING THE JURY ABOUT THESE NUMBERS AND
26 PHILIP MORRIS'S FINANCIAL CONDITION, PHILIP MORRIS
27 U.S.A.'S, FINANCIAL CONDITION, MEANING YOU ARE
28 TAKING INTO ACCOUNT LITIGATION AND SETTLEMENTS, MR.

6027

1 JOHNSON TOLD YOU, TOTALLY UNCONTRADICTED, THAT
2 PHILIP MORRIS HAS STATED IN ITS LATER SHAREHOLDER
3 LETTERS AND ITS LATER FINANCIAL STUFF, WE HAVE, OUR
4 PROFITS HAVE BEEN WAY UP SINCE THOSE SETTLEMENTS.
5 REMEMBER THAT. SETTLEMENTS,
6 PROFITS WENT UP.
7 ANYWAY, HERE'S WHAT'S HAPPENED FROM
8 1998 TO 2000, THIS IS DOMESTIC TOBACCO ALONE.
9 THEIR OPERATING REVENUES HAVE SKYROCKETED.
10 THIS IS PROFITS. SAME PERIOD OF
11 TIME. PHILIP MORRIS, U.S.A., FROM 1998, I GUESS
12 THAT'S THE PROOF OF THE PUDDING THERE, PROFITS HAVE
13 GONE THROUGH THE ROOF.
14 I ALREADY SAID THAT BUT THIS IS NOT
15 GOING TO BE IN THE JURY ROOM. SO I SIMPLY GOT THAT
16 FROM MULTIPLYING 400,000 BY THE NUMBER OF YEARS.
17 THE FINANCIAL CONDITION OF THE
18 COMPANY THAT YOU MUST HAVE IN MIND IS NOT THE BIG
19 PHILIP MORRIS PARENT COMPANY, NOT. IT IS PHILIP
20 MORRIS U.S.A., WHICH IS THE DOMESTIC TOBACCO
21 COMPANY.
22 BECAUSE THE DOMESTIC TOBACCO
23 COMPANY IS NOT TRADED ON THE NEW YORK STOCK
24 EXCHANGE SEPARATELY. MR. JOHNSON FIGURED OUT
25 SEVERAL DIFFERENT WAYS OF FIGURING ITS FINANCIAL
26 CONDITION.
27 AND HERE'S HOW HE WENT ABOUT DOING
28 THAT.

6028

1 FIRST, HE TALKED ABOUT THE DOMESTIC
2 TOBACCO COMPANY, THAT'S THE DEFENDANT, THAT'S WHO
3 WE ARE SUING HERE.
4 FIRST HE TALKED ABOUT THEIR VERSION
5 OF THE BIG COMPANY'S OVERALL REVENUES. AND HE
6 SHOWED US THAT TOBACCO U.S.A. ACCOUNTS FOR ROUGHLY
7 28 PERCENT OF THE BIG COMPANIES' REVENUES.
8 AND YOU CAN SEE INTERNATIONAL
9 TOBACCO AND INTERNATIONAL FOOD AND U.S.A. OR NORTH
10 AMERICAN FOOD, IT'S ALL THERE. BUT WHAT HE DID IS
11 HE TOOK THE PROPORTION OF REVENUES, AND REVENUES
12 WERE 80 BILLION DOLLARS, IN ROUND NUMBERS, AND ON
13 PROFITS HE DID THE SAME THING. AND THERE'S THE
14 OVERALL PROFITS, TOBACCO U.S.A., IS A THIRD, THE
15 OVERALL DEAL, SOMETHING LIKE 16 BILLION DOLLARS,
16 AND THE REASON HE DID THESE TWO THINGS, WE HAVE A
17 THIRD ON ONE, 28 PERCENT ON THE OTHER.

18 HE FIGURED THE MARKET
19 CAPITALIZATION OF THE COMPANY THAT'S TRADED ON THE
20 STOCK EXCHANGE AND THE MARKET CAPITALIZATION IS
21 SIMPLY TAKING THE STOCK PRICE OUT THERE TODAY AND
22 MULTIPLYING IT BY HOW MANY STOCKS ARE OUT THERE.
23 AND YOU GET, ON THE DAILY HERE, 105 MILLION -- 105
24 BILLION DOLLARS.
25 SO DOING THESE TWO THINGS HERE, HE
26 SAID, HEY, 28 PERCENT, 33 PERCENT, AND HE TOLD YOU
27 THAT HE FIGURED THAT THE FINANCIAL CONDITION OF
28 PHILIP MORRIS DOMESTIC TOBACCO, FIGURING IT THAT

6029

1 WAY, WAS SOMEPLACE BETWEEN 30 ON THE ONE HAND AND
2 35 BILLION DOLLARS. AND HE DIDN'T HAVE A FAVORITE.

3 BUT HE DID HAVE A FAVORITE IN
4 ANOTHER WAY. AND THE OTHER WAY WAS TO TELL YOU
5 THAT PHILIP MORRIS HAD JUST BOUGHT OUT THE NAME
6 RIGHTS OF THREE TOBACCO COMPANIES, THREE TOBACCO
7 BRANDS, CHESTERFIELD, L&M, AND THE THIRD ONE I
8 FORGET, 300 MILLION BUCKS. AND THESE THREE BRAND
9 NAMES ACCOUNTED FOR SOMETHING LIKE TWO-TENTHS, I
10 MAY BE OFF BY A COUPLE TENTHS, BUT A COUPLE TENTHS
11 OF ONE PERCENT OF THE MARKET.

12 AND HE SAID IF PHILIP MORRIS PAYS
13 THIS MUCH FOR A COUPLE OF TENTHS OF ONE PERCENT OF
14 THE MARKET, HERE'S WHAT THE MARKET IS WORTH.

15 PHILIP MORRIS'S SHARE, U.S.A., 75
16 BILLION DOLLARS.

17 AND HE SAID, IN HIS VIEW, THAT WAS
18 THE FINANCIAL CONDITION, THAT WAS THE PROPER
19 FINANCIAL CONDITION TO TAKE THAT INTO ACCOUNT FOR
20 WHAT I AM GOING TO ASK YOU TO PUNISH AND DETER, 75
21 BILLION DOLLARS.

22 ANYWAY, HE'S NUMBER 3. LET ME SAY
23 SOMETHING ELSE FIRST.

24 JUST TO PUT THIS IN SOME KIND OF
25 TERMS THAT WE CAN UNDERSTAND, WHAT I AM ABOUT TO
26 SAY, LET'S SAY THE AVERAGE PERSON, JUST TO MAKE AN
27 AVERAGE PERSON, JUST FOR THE HECK OF IT, MAKES
28 \$50,000 A YEAR, WHICH THE AVERAGE PERSON DOES NOT,

6030

1 AND LET'S COMPARE IT TO FIVE BILLION DOLLARS A
2 YEAR, AND THE MULTIPLICATION FACTOR AS HUNDRED
3 THOUSAND, SO IF THE AVERAGE PERSON GOES DOWNSTAIRS
4 IN THE CAFETERIA HERE AND BUYS THIS CUP OF COFFEE
5 FOR A BUCK, PHILIP MORRIS' EQUIVALENT TO THIS CUP
6 OF COFFEE, IS \$100,000.

7 OR IF THE AVERAGE PERSON GOES DOWN
8 TO THE PARKING GARAGE AND PAYS TEN BUCKS TO PARK, I
9 KNOW YOU JURORS DON'T HAVE TO DO IT, BUT 10 BUCKS,
10 THE SAME THING FOR PHILIP MORRIS TO PARK IS A
11 MILLION DOLLARS.

12 IF THE AVERAGE PERSON MAKES \$25,000
13 A YEAR, DOUBLE THEM UP. \$200,000 FOR A CUP OF
14 COFFEE, SAME THING. TWO MILLION BUCKS TO PARK.

15 THAT'S WHAT WE ARE DEALING WITH
16 HERE, AVERAGE PERSON TO PHILIP MORRIS.

17 THAT'S HOW MANY YEARS' EARNINGS?

18 THIRD, THE PUNITIVE DAMAGES MUST
19 BEAR A REASONABLE RELATION TO AN INJURY, HARM OR
20 DAMAGE SUFFERED BY THE PLAINTIFF.

21 AND THERE IS NO DEFINITION, THAT'S
22 FOR YOU TO DECIDE.

23 SO I HAVE GOT 10 MINUTES. AND I AM
24 NOT GOING TO QUITE TAKE THE TEN MINUTES. BUT
25 FOLLOW THIS ALONG, IF YOU WILL.
26 LET'S JUST SAY THAT I KNOW NONE OF
27 US WOULD DO IT, BUT LET'S JUST SAY THAT SOMEONE WAS
28 IN THE DIAMOND LANE WITH ONE PERSON IN THE CAR.

6031

1 AND YOU GOT CAUGHT. A MINIMUM FINE FOR BEING IN
2 THE DIAMOND LANE WITH ONE PERSON IN THE CAR IS 271
3 BUCKS.

4 NOW BEING IN THE DIAMOND LANE WITH
5 ONE PERSON IN THE CAR IS NOT EXACTLY WIFE BEATING.
6 IT'S NOT EVEN PURSE SNATCHING. THAT'S NOT EVEN
7 TAKING A CANDY BAR WITHOUT PAYING FOR IT.

8 BUT BEING IN THE DIAMOND LANE WITH
9 ONE PERSON IN THE CAR IS 271 BUCKS. AND JUST TO
10 BRING THIS ALL DOWN TO WHERE WE CAN UNDERSTAND IT
11 HERE, THE \$271 FINE, IF THE AVERAGE PERSON IS
12 MAKING 50,000 BUCKS A YEAR, THAT'S A 27 MILLION
13 DOLLAR FINE FOR PHILIP MORRIS.

14 IN OTHER WORDS, TO MAKE THE SAME
15 IMPACT ON PHILIP MORRIS AS IT DOES ON THE AVERAGE
16 JOE DRIVING DOWN THE DIAMOND LANE, IF AVERAGE JOE
17 OR JOSEPHINE MAKES 50 GRAND, IS 27 MILLION,
18 \$100,000.

19 AND IF THE AVERAGE JOE OR JOSEPHINE
20 IS MAKING 25,000 BUCKS A YEAR, THAT SAME DIAMOND
21 LANE VIOLATION FINE IS \$54,200,000.

22 AND I THINK THE AVERAGE PERSON
23 PROBABLY MAKES SOMEPLACE BETWEEN THOSE TWO NUMBERS,
24 SOMEWHERE.

25 SO I JUST WANT TO SAY, PUNITIVE OR
26 EXEMPLARY DAMAGES HERE OF 27 MILLION DOLLARS TO 54
27 MILLION DOLLARS IS A DIAMOND LANE VIOLATION.

28 PHILIP MORRIS HAD FIVE BILLION

6032

1 DOLLARS A YEAR, MAKES 100 MILLION DOLLARS A WEEK,
2 100 MILLION TIMES 50 GETS YOU FIVE BILLION.

3 \$100,000 A WEEK DIVIDED BY SEVEN
4 DAYS IS 14 MILLION DOLLARS A DAY.

5 DIVIDED BY 24 HOURS, 600,000 BUCKS
6 IN AN HOUR.

7 I HAVE BEEN ARGUING SINCE 11:00
8 NOW, AFTER THE BREAK, APPROXIMATELY, WHILE I HAVE
9 BEEN ARGUING SINCE 11 O'CLOCK, PHILIP MORRIS
10 TOBACCO, U.S.A., HAS JUST MADE ANOTHER \$600,000.

11 MY ARGUMENT HAS GONE ON FOR A DAY
12 AND A HALF. PHILIP MORRIS HAS MADE 21 MILLION
13 DOLLARS.

14 THIS TRIAL HAS LASTED SINCE MARCH
15 19, PHILIP MORRIS HAS MADE JUST SHY OF A BILLION
16 DOLLARS.

17 THIS IS THE SMALL COMPANY, NOT THE
18 BIG COMPANY.

19 1994:

20 "THE LEGAL ARENA WE'RE
21 COMMITTING ALL THE RESOURCES NECESSARY
22 TO DEFEND THE COMPANY FROM NEW FORMS
23 OF LITIGATION, MAKING SURE WE HAVE THE
24 BETTER FIRE POWER THAN OUR FOES, NO
25 MATTER HOW FORMIDABLE. IN THE NEW
26 CLASS ACTION SUITS AND STATE MEDICAID
27 CASES, WE BELIEVE THE LAW CONTINUES TO

28 BE ON OUR SIDE. ALL THOSE NEW CASES

6033

1 POSE DIFFICULT CHALLENGES. WE SHOULD
2 ULTIMATELY PREVAIL ON THEM JUST AS WE
3 HAVE BEEN SUCCESSFUL IN OTHER TYPES OF
4 CASES OVER THE LAST 40 YEARS. IT IS
5 IMPORTANT TO NOTE HERE THAT THE
6 TOBACCO INDUSTRY HAS NEVER LOST OR
7 PAID TO SETTLE A CASE. BEYOND
8 DEFENDING OURSELVES, WE ARE TURNING
9 THE LEGAL TABLES ON SOME OF THOSE WHO
10 ATTACK US. WE ARE GOING ON THE
11 OFFENSIVE TO VINDICATE OUR RIGHTS AND
12 TO MAKE IT CLEAR THAT CURRENT NOTIONS
13 OF POLITICAL CORRECTNESS CANNOT BE
14 USED TO JUSTIFY UNLAWFUL CONDUCT THAT
15 ABRIDGES THOSE RIGHTS. WE'RE SUING
16 THE E.P.A., SUING STATE AND LOCAL
17 GOVERNMENTS, SUING ABC," HEY, THEY ARE
18 REALLY TOUGH.

19 THEY GOT A RIGHT TO THINK THEY ARE
20 TOUGH, BECAUSE THEY HAD AN UNRESTRICTED RIGHT, IN
21 WHICH THEIR COMPANY HAS GONE FROM BEING WHAT ELLEN
22 MERLO CALLED SOME SMALL TOBACCO COMPANY TO HAVING
23 THE FRANCHISE, THE LARGEST CONSUMER PRODUCT
24 ORGANIZATION IN THE WORLD BASED ON THAT.

25 YOU WANT TO DEFER FUTURE CONDUCT?
26 OCTOBER 13, 1999, THIS IS RIGHT
27 AROUND WHEN MR. BOEKEN WAS BEING DIAGNOSED WITH
28 LUNG CANCER, ALSO BEING LAUNCHED IS A HUNDRED

6034

1 MILLION A YEAR T.V. ADVERTISING BLITZ,
2 ADVERTISED --

3 MR. LEITER: OBJECTION, HEARSAY.
4 THE COURT: SUSTAINED.

5 MR. PIUZE: OKAY. MS. MERLO ADMITTED
6 AFTER I LEANED ON HER PRETTY HARD, THAT PHILIP
7 MORRIS SPENT 100 MILLION DOLLARS TO ADVERTISE THE
8 FACT THAT IT GAVE 75 MILLION DOLLARS TO CHARITY.
9 SHAME ON THEM.

10 NOW THOSE, THIS IS PROFESSOR COBBS
11 HOFFMAN. THOSE WHO DO NOT PAY ATTENTION TO THE
12 PAST ARE DOOMED TO REPEAT IT.

13 THOSE WHO DO NOT PAY ATTENTION TO
14 THE PAST ARE DOOMED TO REPEAT IT.

15 THIS IS THE TIME, THIS IS THE
16 PLACE, YOU ARE THE PEOPLE, NOW.

17 YOU WANT TO REALLY PUNISH PHILIP
18 MORRIS, YOU WANT TO REALLY PUNISH PHILIP MORRIS,
19 WATCH.

20 THAT'S ABOUT A THREE DIAMOND LANE
21 VIOLATION, THREE DIAMOND LANE VIOLATIONS. THAT'S
22 ME TAKING AWAY MY KID'S ALLOWANCE FOR A WEEK, WHICH
23 IS A NICE ROUND NUMBER. I HAVE NO PRIDE OF
24 AUTHORSHIP.

25 IF EVER ANYONE DESERVED IT, THIS IS
26 THE TIME, THIS IS THE PLACE, YOU ARE THE PEOPLE.
27 DON'T LET THEM ESCAPE.

28 AFTER 1978, AS MR. CARLTON BROUGHT

6035

1 OUT, AND AFTER THE SETTLEMENTS, THEIR PROFITS WENT
2 UP THREE TIMES. STOP IT.

3 THANK YOU.

4 THE COURT: THANK YOU, COUNSEL.
5 ALL RIGHT, LADIES AND GENTLEMEN, WE
6 WILL TAKE OUR AFTERNOON BREAK. WE WILL SEE YOU AT
7 1:30 THIS AFTERNOON. DON'T DISCUSS THE CASE WITH
8 ANYONE.
9
10 (AT 12 NOON, THE LUNCH
11 RECESS WAS TAKEN TO
12 1:30 P.M. OF THE SAME DAY.)
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28